DECISIONS OF THE

FEDERAL MARITIME COMMISSION

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Washington, D.C.

April 30, 1977

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FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 343(I)

UNIROYAL, INC.

v.

HAPAG-LLOYD AKTIENGESELLSCHAFT

NOTICE OF DETERMINATION NOT TO REVIEW

April 15, 1975

Notice is hereby given that the Commission on April 15, 1976, has determined not to review the decision of the Settlement Officer in this proceeding served April 8, 1976.

In the first sentence of page two of the Settlement Officer's decision the reference to the weight of the shipment as "3,260 pounds" should read "3,620 pounds".

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 343(I)

UNIROYAL, INC.

v.

HAPAG-LLOYD AKTIENGESELLSCHAFT

Reparation Awarded.

DECISION OF WALDO R. PUTNAM, SETTLEMENT OFFICER*

By complaint filed March 5, 1976, Uniroyal, Inc. (complainant) alleges that Hapag-Lloyd Aktiengesellschaft (carrier) assessed ocean freight charges on a shipment of industrial tires which were in excess of those lawfully applicable at the time of the transportation in violation of Section 18(b)(3) of the Shipping Act, 1916.

The carrier denied the involved claim solely on the basis of Clause 8 on Page 11 of North Atlantic Continental Freight Conference Tariff FMC-4, which time-bars claims for adjustments of freight charges not received by the carrier within six months after date of shipment.

In support of its claim, the claimant furnished a copy of the bill of lading and the carrier's denial of the claim.

The claim involves a shipment of 220 industrial tires weighing 3,260 pounds and measuring 168 cubic feet from New York to Antwerp, Belgium on October 4, 1974. The shipment was rated as 168 cubic feet at $159.00 per 40 cubic feet, which produced ocean freight revenue of $667.80.

Eleventh Revised Page 186 of the aforementioned conference tariff, which was in effect at the time of the shipment, provides a weight rate on the subject commodity of $159.000 per long ton.* Properly rated, the shipment would have produced ocean freight revenue of $256.95 (1.616 w.t. × $159.00). Accordingly, the complainant was overcharged in the amount of $410.85 ($667.80 less $256.95).

The carrier, in its response to the instant complaint admitted that the

*Both parties having consented to the informal procedure of Rule 19, 46 CFR 502.301-304 (as amended) this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

*This rate includes an Emergency Surcharge of $9.50 applicable to all weight based rates (14th Revise Title Page effective October 1, 1974).

involved claim was denied solely in accordance with its published tariff provision, which reads in pertinent part: ". . . claims for adjustment of freight charges must be presented to the member line in writing within six months after date of shipment." The carrier also admitted in its response that it did not and could not contest the amount of the overcharge claimed.

The Commission, in Informal Docket No. 115(I), *Colgate Palmolive Company* v. *United Fruit Company* reiterated what is specifically stated in *Proposed Rules—Time Limit on Filing Overcharge Claims* 12 F.M.C. 298,308 (1969) that:

". . . once a claim has finally been denied by a carrier the shipper may still seek and in a proper case recover reparation before the Commission at any time within two years of the alleged injury, and this is true whether the claim has been denied on the merits or on the basis of a time limitation rule."

Section 18(b)(3) of the Shipping Act, 1916, makes it unlawful for a carrier to charge, demand, collect or receive a greater compensation than the rates or charges which are specified in its tariff.

The filing of a timely complaint with this Commission effectively overrides any tariff technicality under which an overcharge claim legally may be denied by a water carrier subject to our jurisdiction during the two-year statutory period for recovering reparation set forth in Section 22 of the Shipping Act, 1916. A proper case for the recovery of reparation having been made, a refund in the amount of $410.85 is due the claimant; and it is so ordered.

(S) WALDO R. PUTNAM,
Settlement Officer.

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

[DOCKET NO. 73-53; GENERAL ORDER 19, AMDT. 1]

Part 538—Dual Rate Contract Systems in the Foreign Commerce of the United States

PROMULGATION OF PROCEDURES AND REQUIREMENTS FOR IMPOSING AND ALTERING CURRENCY ADJUSTMENT SURCHARGES IN THE EVENT OF A CHANGE IN THE EXCHANGE RATE OF THE TARIFF CURRENCY

July 1, 1975

The purpose of this regulation is to provide a nonexclusive procedure by which a conference of carriers operating in the foreign commerce of the United States and under an approved dual rate system may justify and impose uniformly applied currency surcharges on all rates within the scope of its dual rate contract on less than 90-day notice when necessary because of depreciation of the conference's tariff currency. This regulation amends Subpart A of Part 538 of the Commission's regulations by: (1) the addition of a new section 538.4 titled "Procedures and Requirements for Imposing and Altering Currency Adjustment Surcharges in the Event of a Change in the Exchange Rate of the Tariff Currency"; and (2) the addition of a new paragraph 14(d) to the Uniform Merchant's Contract currently set forth in section 538.10 of Subpart B of Part 538.

By Notice published in August 1973 (38 F.R. 22495, August 21, 1973), the Commission issued its proposed rule regarding short notice contract rate currency surcharges based upon tariff currency depreciation. The original rule was divided into two lengthy subsections which provided for surcharge imposition and removal or modification, respectively. Comments to the proposed rule were filed by 11 parties representing the views of 30 conferences and the Committee of European Shipowners (now called Council of European & Japanese Shipowners' Association).

While no party commenting raised objection to the policy expressed in the proposed rule, many of the parties objected to various specific provisions of the rule as being complex and burdensome to a degree which made the proposed relief provisions virtually illusory. In response

to such comments, and following thorough review and analysis of the parties' views, Hearing Counsel filed its Reply to Comments of the parties.

Based on its exhaustive review of the Comments filed, Hearing Counsel viewed the originally proposed rule as requiring sweeping modification in order to incorporate the comments of the parties, to streamline the proposed rule, and to make the rule workable. Hearing Counsel's Reply to Comments, therefore, consisted of a major revision of the original rule and provides the fundamental scheme of the final rule promulgated here.

Following Hearing Counsel's filing of its revised rule (Reply to Comments), eight parties filed Answers which consisted of comments upon the revision of the rules as proposed by Hearing Counsel. While the revised rule proposed by Hearing Counsel still contained minor points requiring clarification in the opinion of the commenting parties, the majority of those parties filing comments endorsed the revision suggested by Hearing Counsel and generally urged its adoption while reserving certain minor objections.

The rule in this proceeding in its revised form then came before the Commission and the Commission members, as well, raised certain questions which they felt required clarification. By Order of Reopening served on December 31, 1974, the Commission reopened the proceeding for the limited purpose of allowing Hearing Counsel to respond to the questions of the Commission and affording interested parties the opportunity to comment further upon any issues raised thereby. Hearing Counsel thereafter submitted its responses, and nine interested parties filed comments. The rule herein promulgated is derived from the revision proposed by Hearing Counsel and conforms closely to that revision. As such, the discussion of comments is limited to issues raised in comments to that revision and considered by the Commission.

As revised by Hearing Counsel, the rule here promulgated consists of a system by which tariff currency depreciation may serve as a basis on which an adjustment to rates by surcharge may be justified. The computation and justification is founded upon a calculation of "major operating currencies" and the percentage of expenses incurred by a conference and its members in those currencies. The percentage of expenses information is to be maintained up to date by the conferences and those figures submitted to the Commission on a quarterly basis. The relative values of major operating currencies and the tariff currency are then compared to a base date specified in the dual rate contract and, if fluctuations when weighted by percentage of expenses so indicate, a currency adjustment surcharge may be imposed on short notice.

One of the major, continuing objections to this rule raised by commenting parties has been the alleged burden upon the conferences which compilation of these quarterly statements entails. The Commission has thoroughly considered this allegation and is unable to agree that the burden is such as to warrant elimination of these expense reports. It has

been the experience of the Commission in the past that conferences have been able rapidly to provide such data when requested to do so by the Commission in particular instances. It is the Commission's opinion that such information is reasonably available on a quarterly basis and is maintained in the normal course of business by the member carriers of a conference. This being so, the importance of the data received renders unavoidable the slight burden which may be imposed by this quarterly reporting requirement. Therefore, the requirement of the filing of a quarterly statement of percentage of expense in various major operating currencies has been maintained.

A second recurring objection to these rules pertains to the requirement in the rule that currency surcharges imposed must similarly be removed or reduced when the tariff currency appreciates in relation to other major operating currencies. The Commission has considered the suggested omission of the requirement but is unable to accept the proposal. There would appear to be an overwhelming inequity involved in any rule which would permit an increase in rates by surcharge when the tariff currency depreciates, but no removal or reduction of such imposed surcharge when the tariff currency appreciates.

Additional comments have raised the suggestion that the base date used to compare relative currency values should not be "the day this provision was adopted" as proposed by Hearing Counsel. Rather, it has been suggested that a more flexible approach be taken allowing the base date to be the date when the clause in the contract was adopted by a conference, the date on which the last previous surcharge was imposed or some other date. The Commission has reviewed these suggestions and has determined that more flexibility should be allowed in the fixing of a base date. Therefore, the rule as adopted provides for the conference to select its own base date which it shall specify in its dual rate contract. However, in order to preclude the retroactive recovery of currency losses and consequent large surcharges the Commission makes it clear that no base date may be chosen which antedates the day on which the amended contract is submitted to the Commission for approval.

A further issue arose from questions posed by the Commission to Hearing Counsel which merits discussion. As a part of the revision suggested by Hearing Counsel, it was recommended that surcharges justified by the computations in the rule be permitted to be made applicable to the conference trade as a whole or to particular trades or segments of trades covered by the terms of the dual rate contract and the tariff of the conference involved. This recommendation has been adopted in the final rule. However, it is imperative that these terms be clearly understood as they relate to this rule. For purposes of this rule, the terms "trade" or "trade segment", to which a currency surcharge may be applied, are used to mean the following:

"Trade" means those ports within the scope of a dual rate contract and which are included in or are based upon a simple rate group.

"Trade segment" means any port or combination of ports which comprise a portion or segment of a "trade".

A further modification has been adopted which was previously implicit in the proposed rule but which has now been made explicit. Except as otherwise provided specifically in the rule, any surcharge imposed pursuant to this rule must be kept completely separate from the general rate structure of the conference. This requirement has been included to ward off the obvious regulatory quagmire which the Commission would face in attempting to ascertain the justifiability of a surcharge which had been incorporated into the general rate structure of a conference in the foreign commerce of the United States. Without such a separation of general rates and surcharges, the equitable requirement of reduction in surcharges would have been gutted. Such a lack of enforceability of reductions would have been a disservice to the industry and its shippers and would have resulted in a steady upward spiral of rates. Such an impetus has been determined not to be in the best interest of the public.

One final modification to the rule has been accomplished with respect to the requirement that any currency adjustment surcharge be implemented in certain increments. As proposed, the incremental requirement provided: "Each such surcharge shall take place in increments of not less than two percent." It is the opinion of the Commission that such a provision might be improperly construed as requiring a conference which could justify a three percent surcharge to impose no more than the two percent increment. This would force the conference to absorb the remaining one percent until such time as a four percent surcharge would have justified imposing the next two percent increment. To avoid this possible confusion the rule has been amended by changing the provision quoted above to read "Each such surcharge imposed shall take place in increments of two percent or more."

In the course of the lengthy proceeding, many other issues have been raised pertaining to specific portions of this rule which have not been discussed here. In the main they have not been discussed because they were considered and incorporated in the rule. A limited number of suggestions raised in the many comments, however, have not been reflected in this rule. Any such suggestions have been thoroughly reviewed by the staff and the Commission itself and have not been adopted only after such review and detailed consideration. To list each comment raised would be more confusing than explanatory and they have therefore not been discussed.

Therefore, pursuant to sections 3 and 4 of the Administrative Procedure Act (5 U.S.C. 553) and sections 14b and 43 of the Shipping Act, 1916 (46 U.S.C. 813a and 841a) Part 538 of Title 46 CFR is hereby amended by the addition of a new section 538.4.*

*46 CFR 538.4.

Effective date: This amendment shall become effective 30 days after the date of publication in the *Federal Register*.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 319(I)

ROHM AND HAAS COMPANY

v.

VENEZUELAN LINE

NOTICE OF DETERMINATION NOT TO REVIEW

July 2, 1975

Notice is hereby given that the Commission determined not to review the decision of the Settlement Officer in this proceeding served June 17, 1975.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 319(I)

ROHM AND HAAS COMPANY

v.

VENEZUELAN LINE

Reparation Awarded.

DECISION OF CAREY R. BRADY, SETTLEMENT OFFICER[1]

Complainant seeks reparation in the amount of $357.40 from respondent, claiming a freight overcharge on a shipment from New York, New York to Puerto Cabello, Venezuela carried aboard respondent's vessel LA GUAIRA, a bill of lading dated February 23, 1973. The shipment consisted of 31 pallets said to contain 620 bags of synthetic resin paraloid. The gross weight of the shipment was 27,725 lbs. and measured 1,625 cubic feet. The shipment was rated on the basis of $50.50 per 40 cubic feet, which was the applicable rate for "Resins, Synthetic, N.O.S. in other packing:[2] actual value not over $300 per freight ton" according to Item No. 495 of the respondent's tariff in effect at that time.[3] Total charges were assessed in the amount of $1,654.94 which included a $2.50 measurement ton rate discount pallet allowance plus surcharge and packing charge. The shipment, according to complainant, should have been rated on the basis of $100.50 per 2,000 lbs., the applicable rate for "Resins, Synthetic, viz: N.O.S., in bulk in bags: Actual value over $650 but not over $1,000 per 2,000 lbs.," Class rate 1 W.[4] In addition, complainant alleged the shipment was entitled to two allowances on prepalletized shipments, the first on the weight of the shipment and the second on the rate as provided in Items 26(f) and 26(i) of the respondent's tariff.

[1] Both parties having consented to the informal procedure of Rule 19(a) of the Commission Rules of Practice and Procedure (46 CFR 502.301), this decision shall be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2] The other packing is packing other than that described on the line below the generic heading of Resins, Synthetic. The packing described on the line below Resins, Synthetic is "In bulk in bags, in bags, in cartons or in fiber drums".

[3] U.S. Atlantic and Gulf-Venezuela and Netherlands Antilles Conference, Freight Tariff FMC No. 2, S.B. Ven. – 11, 16th Rev. Page 12.

[4] Ibid, Item No. 1000, 4th Rev. Page 122–A and Item No. 999, 5th Rev. Page 68.

Respondent denied the claim solely on the provisions of tariff Item No. 11 which requires that claims be filed within six months after the date of shipment. The Commission has ruled that a claim filed within two years from the date the cause of action arose must be considered on its merits.[5] The bill of lading is dated February 23, 1973 and the claim was filed with the carrier in November, 1973 and with the Commission on March 14, 1974. The claim has been filed within the two year statutory limit and thus will be treated on the merits.

Respondent does not challenge any of the contentions of the complainant, in fact by letter dated September 30, 1974, respondent so stated, and in addition pointed out that had "the refund been requested within the six month period provided for in the tariff there is no question that it would have been honored".

While the Commission has ruled that a rule similar to the one on which respondent is denying relief cannot be used to defeat a claim properly filed with the Commission the complainant nevertheless has a heavy burden of proof once the shipment has left the custody of the carrier.[6]

The two rates in question are both rated under Resins, Synthetic, N.O.S. The $50.50 per 40 cubic ft. commodity rate requires that the shipment be in packing other than "in bulk in bags, in bags, in cartons or in fiber drums" (actual value not over 300 per freight ton). The Class 1 W rate, $100.50 per 2,000 lbs., requires the shipment to be packed "in bulk in bags" (actual value over $650 but not over $1,000 per 2,000 lbs.). The bill of lading and supporting shipping documentation clearly show the synthetic resins to be packed in bags as required by tariff Item No. 1000. In addition by mathematical computation from the value and weights given on the bill of lading and the commercial invoice the value of the shipment per 2,000 lbs. can be readily determined. The supporting documentation shows 3 pallets of the synthetic resins weighed 3,225 lbs. with a value of $1,590 and 28 pallets of synthetic resins weighed 24,500 lbs. with a value of $8,064. Dividing the 3,225 lbs. and 24,500 lbs. by 2,000 lbs. converts the shipment into weight tons of 1.6125 tons and 12.25 tons, respectively. Dividing the stated values by the calculated weight tons ($1,590 by 1.6125 and $8,064 by 12.25) the actual value of the shipment per 2,000 lbs. is determined to be $986.05 and $658.29, respectively. Clearly, within the value range of over $650 but not over $1,000 per 2,000 lbs. as prescribed by the Class 1W rate of $100.50. Therefore, the shipment should be assessed at that rate.

In regard to the allowances of prepalletized shipments the relevant tariff items provide in pertinent part as follows:

Item 26(f)

. . . When cargo is freighted on a weight basis the actual weight of the pallet shall be deducted but not in excess of 10% of the gross weight of the cargo and pallet. . . .

[5] Colgate Palmolive Company v. United Fruit Company, Informal Docket No. 115(I), 1970.
[6] Ibid.

Item 26(i)

Provided, prepalletized cargo complies in all respects with the rules set forth herein, the carrier(s) will allow a discount of $2.50 per ton weight or measurement, on the same basis as cargo is being freighted.

The respondent does not dispute that the cargo was properly palletized and complied with all the rules set forth in Item 26. The respondent's bill of lading clearly shows the weight of the 31 pallets to be 63 lbs. each as does the complainant's supporting shipping documents. Therefore, it is found that the complainant has furnished the necessary information at the time of shipment to determine the weight of the pallets as required by Items 26(f) and (i) and has otherwise met the requirements of Item 26. Hence, complainant is entitled to a pallet weight allowance of 1,953 lbs (63 lbs. × 31 pallets) and a rate discount of $2.50 per 2,000 lbs.

Complainant having met his burden of proof, reparation is awarded in the amount of $357.40, the difference between the charges assessed of $1,654.94 and the correct charges of $1,297.54 (25,772 lbs. at $100.50 per 2,000 lbs. less $2.50 rate discount plus surcharge and packing charge).

(S) CAREY R. BRADY,
Settlement Officer.

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

SUBCHAPTER A—GENERAL PROVISIONS

[GENERAL ORDER NO. 33; DOCKET NO. 72-62]

July 3, 1975

Part 506—Regulations to Adjust or Meet Conditions Unfavorable to Shipping in the Foreign Trade of the United States

General Order No. 33 was published by the Commission on November 1, 1974 and was to become effective on November 31, 1974. However, since General Order No. 33 prompted numerous requests to delay the effective date and extend the time for filing petitions for reconsideration, the Commission on November 21, 1974 stayed the effective date of the rule and invited interested parties to file their views and arguments regarding the reconsideration thereof.

Comments on reconsideration have been submitted by or on behalf of a number and variety of interested parties including Hearing Counsel. The Commission has carefully considered the position of all the parties and the final rules promulgated herein have been drafted with the parties' comments and arguments in mind. The bulk of the comments submitted concern themselves with matters which have been argued before the Commission in this proceeding before and which have already been fully considered and properly disposed of by the Commission. We will not address ourselves to those matters further. We are limiting our discussion here to those comments and arguments which have prompted changes in the final rules promulgated herein. A section by section discussion of these changes is therefore appropriate.

Section 506.1 Purpose

The word "may" has been substituted for "will" in the last sentence of this section to make it clear that Commission action under these section 19 regulations is discretionary.

506.2 Scope

This section was likewise revised to indicate the discretion of the Commission in invoking these regulations. A change was also made in the

wording to make this section consistent with the wording of the Merchant Marine Act, 1920.

506.3 Findings—Conditions unfavorable to shipping in the foreign trade of the United States

Paragraph (c) of this section was amended to indicate that the Commission was not concerned with mere differences in treatment to the vessels in the foreign trade of the United States but is concerned with the effect those differences and treatments have upon the foreign trade of the United States. One party wished the Commission to add to this section and other sections explicit provisions relating to the use of rebates in the foreign trade. Since rebating is covered in section 18(b)(3) of the Shipping Act, 1916 and may be covered under the general terms of these regulations, the Commission does not think it necessary to make any such amendment. The wording of the first sentence of this section has been changed to make it clear that these regulations are to apply to the acts of foreign governments or of foreign owners, operators, agents, or masters.

506.4 Petitions for section 19 relief—General—Who may file

The wording of this section has been changed to indicate that the Commission is not, in any way, limiting the application of this section by specifically naming some of the persons who may file petitions.

506.8 Initial action to meet apparent conditions unfavorable—Resolution through diplomatic channels

This section was changed to give foreign countries notice that the Commission will notify the Secretary of State when conditions unfavorable to shipping in the foreign trade of the United States apparently exist and that it *may* request that he seek resolution of the matter through diplomatic channels.

506.9 Actions to meet conditions unfavorable to shipping in the foreign trade of the United States

Commentators to this section asserted that tariff suspension would not be a lawful exercise of section 19 powers. While it is true that sections 18(b)(4) and (5) set out the circumstances when the Commission may suspend tariffs under the Shipping Act, 1916, the powers of the Commission under section 19 of the Merchant Marine Act of 1920 are much broader. Therefore, this section remains unchanged.

506.11 Production of information

Paragraphs (b) and (c) of this section were changed to make it clear that the Commission was not restricting the scope of information to be produced by listing some of the types of information which could be ordered to be produced.

506.12 Production of information—Failure to produce

Objection was directed to section 506.12 because it required the Commission to find conditions unfavorable to shipping in the foreign trade of the United States when there was a failure to produce any information ordered by the Commission to be produced under section 506.11. There was an apparent conflict with the wording of this section and the explanation which was given to it in the preamble to the regulations published on November 1, 1974. In the preamble, the Commission stated that this section would not necessarily apply to situations where there was a bona fide effort to comply. This explanation was in conflict with the clear wording of this section. Many parties asserted that the word "will" should be changed to "may". Such a change has been in order to make this section consistent with the intent of the Commission. This section has also been amended so that appropriate findings of fact may be made when there is a failure to produce as well as the option of a deemed admission.

Other nonsubstantive changes were made to these final rules to conform with the amendments discussed herein. This discussion has not dealt with those comments which we viewed as being either irrelevant or immaterial to the matters at issue.

As a final matter, we would point out for the edification of all concerned,—and lest there be any misunderstanding, that the rule promulgated herein is not to be construed in any way whatsoever as a substitute vehicle by which agreements approved by the Commission under Section 15 of the Shipping Act, 1916, might be contested. Likewise, the new rule is not intended in any way to replace, modify, or limit the traditional criteria considered in connection with applications under section 15.

Therefore, pursuant to the authority of section 19 (1)(b) of the Merchant Marine Act, 1920 (46 U.S.C. § 876 (1)(b)), section 4 of the Administrative Procedure Act (5 U.S.C. § 553), sections 21 and 43 of the Shipping Act, 1916 (46 U.S.C. 820, 841(a)), and Title V of the Independent Offices Appropriation Act of 1952 (31 U.S.C. § 483(a)) and Reorganization Plan No. 7 of 1961 (75 stat. 840), Part 506 of Title 46 CFR is hereby revised.*

Effective date. The provisions of this Part 506 will become effective 30 days after publication in the *Federal Register*.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

*The text of the amendment appears in 46 CFR 506.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 470

AIRLEX INDUSTRIES
RELIABLE CARGO SHIPPING A/C

v.

LYKES BROS. S/S CO., INC.

Authority to refund a portion of freight charges denied..

REPORT

October 14, 1975

BY THE COMMISSION: (Helen Delich Bentley, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett, James V. Day, *Commissioners*).

Lykes Bros. Steamship Co., Inc. (Lykes) applied for permission to refund a portion of the freight charges collected on a shipment described in the bill of lading as Industrial Cooling Towers, carried by Lykes from Baltimore to Haifa, Israel, under bill of lading dated December 2, 1974.

Lykes collected $17,703.33 in freight charges and is seeking permission to refund $4,764.70 thereof. Lykes asserts there was an error in the description of the shipment. Lykes maintains that had it known the true nature of the cargo it would have filed a rate lower than the rate it filed for this particular shipment.

The Presiding Officer issued an initial decision denying the application on the ground that Lykes' error was not an error in a tariff of a clerical or administrative nature or an error due to an inadvertent failure to file an intended rate, as contemplated in P.L. 90–298, which amended section 18(b)(3) of the Shipping Act, 1916 (the Act).

Complainant excepted to the denial of the application.*

We concur in the Presiding Officer's denial of Lykes' application. However, our reason for denying the application is, simply stated, that Lykes failed to comply with a specific statutory prerequisite. Under section 18(b)(3) of the Act, the Commission may, in certain circumstances,

*In view of our disposition of this case we need not discuss Complainant's arguments on exceptions.

at its discretion and for good cause permit a common carrier by water in foreign commerce to refund or waive collection of a portion of freight charges,

Provided . . . That the common carrier . . . has, prior to applying for authority to make a refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based:. . . .
And provided further. That application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment. 46 U.S.C. 817(b)(3).

Respondent has not, prior to applying for permission to refund a portion of freight charges, filed with the Commission a tariff setting forth the rate upon which the refund would be based. The application must therefore be denied. *Oppenheimer International Corp. v. Moore-McCormack Lines, Inc.*, 15 F.M.C. 49 (1971). Since more than 180 days have elapsed from the date of shipment, it is now too late for the carrier to file a new tariff and thereafter refile the application. No relief, therefore, can be granted under the "special docket" procedure set forth in section 18(b)(3) of the Act as implemented by Rule 6(b) of the Commission's Rules of Practice and Procedure. 46 CFR 502.92(a).

This does not preclude, however, Complainant's filing a complaint under section 22 of the Act, alleging the violation of any section of the Act, such as sections 16 or 17 and asking reparation for any injury caused by such alleged violation.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 470

AIRLEX INDUSTRIES
RELIABLE CARGO SIPPING A/C

v.

LYKES BROS. S/S CO., INC.

Application denied.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

By application filed March 12, 1975, Lykes Bros. Steamship Co., Inc., requests authority to refund a portion of the freight charges applied to a shipment of Industrial Cooling Towers weighing 56,832 pounds and measuring 6,572 cubic feet, carried per bill of lading dated December 2, 1974, on Lykes vessel *Margaret Lykes* from Baltimore, to Haifa, Israel. The consignor, seeking a breakbulk rate on an American carrier for this particular shipment, requested Lykes to file a $107.75/40 cft. rate for Air Conditioning Machinery. Lykes accordingly filed the rate under Special Permission procedure.[2] After filing and after the cargo was loaded and en route, it was discovered that the lading was Industrial Cooling Towers and not Air Conditioning Machinery. Although the lading was described as Industrial Cooling Towers, nevertheless the basis for the rate charged was Machinery, Air Conditioning. The lower rate sought to be applied is that for Industrial Cooling Towers, allegedly $78.50 W/M.[3]

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

[1] This decision became the decision of the Commission October 14, 1975.

[2] Lykes Bros. Steamship Co., Inc., Gulf & South Atlantic/North Spain, Portuguese & Canary Islands Tariff No. 4 (FMC–63), Original Page 43, effective date November 26, 1974.

[3] The application is imperfect in this regard because the new tariff which sets forth the rate on which such refund would be based has not been filed as required prior to application. In view of the disposition of this proceeding, however, such infirmity is inconsequential. Nevertheless it is necessary if a formal complaint is filed seeking return of the overcharge by way of an award of reparation.

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally, the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of Public Law 90–298 elaborates on the rationale that carriers would be authorized to make voluntary refunds or authorized to waive the collection of a portion of their freight charges for bona fide mistake. The nature of that mistake is particularly described:[4]

. . . Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understands the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the higher rate.

Another example would be where a reissued tariff page contains a typographical error changing the rate, for example, republishing a rate in error as $73 per ton rather than continuing it on the page as $37 per ton. In such a situation under section 18(b)(3) of the Shipping Act, a carrier can charge only the published rate, and the Commission cannot permit an adjustment in the intended rate.

The Senate Report[5] states in the *Purpose of the Bill:*

[Voluntary refunds to shippers and waiver of the collection of a portion of the freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting the intended rate.

Applied to the facts, it appears that Lykes has relied upon an inapplicable section of the Shipping Act for its remedy. Public Law 90–298, amending section 18(b)(3) of the Shipping Act, is concerned with mistakes made by common carriers by water in the foreign commerce of the United States. The application requests the carrier be allowed to charge a lower rate for the arcane reason that this is ". . . the rate which Lykes would have theretofore filed had the true nature of the commodity to be shipped been known at the time of filing." The carrier applied the rate for Air Conditioning Machinery which, it is alleged, was not the correct rate as the cargo actually shipped was Industrial Cooling Towers. On the other hand the consignor requested a lower rate for something other than it actually intended to ship. Whatever the carrier's error may have been, it was not an error in a tariff of a clerical or administrative

[4] House Report No. 920, November 14, 1967 [To accompany H.R. 9437] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

[5] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9437] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges.*

nature or an error due to inadvertence in failing to file a new tariff that the exemption in Public Law 90–298 contemplates.

Where the mistake is other than that stipulated by Public Law 90–298, then the remedy lies in a formal complaint seeking reparation under section 22 of the Shipping Act perhaps using the shortened procedure contemplated by Subpart K of the Commission's Rules of Practice and Procedure (46 CFR 502.181). Claims for reparation based on misclassification may be proved by evidence of what was actually shipped, even though the actual shipment may be other than that described on the bill of lading.[6]

Accordingly, the application of Lykes Bros. Steamship Co., Inc., for authority to refund a portion of the freight charges on a shipment of Industrial Cooling Towers must be denied without prejudice to the filing of a formal complaint seeking return of the overcharge by way of an award of reparation subject to the caveat in footnote three.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
June 3, 1975.

[6] Docket No. 74-2, *Merck Sharp & Dohme v. Flota Mercante Grancolombiana*, ____F.M.C.____, 14 SRR 1626 (1975), citing Informal Docket No. 283(I), *Western Publishing Company, Incorporated v. Hapag Lloyd, A.G.*, ____F.M.C.____, ____SRR____ (1972).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 469

PERKINS-GOODWIN CO., INC.

v.

LYKES BROS. STEAMSHIP CO., INC.

Authority to waive collection of a portion of freight charges denied..

REPORT

OCTOBER 14, 1975

BY THE COMMISSION: (Helen Delich Bentley, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett, James V. Day, *Commissioners*).

This proceeding is before the Commission on exceptions filed by Complainant Perkins-Goodwin Co., Inc., to the Initial Decision served June 6, 1975, denying Lykes Bros. Steamship Co., Inc. (Lykes) permission to waive collection of a portion of the freight charges assessed on a shipment of 894,244 pounds or 37,700 cubic feet of paperboard, carried from New Orleans to Mombasa, East Africa, under bills of lading dated September 12, 1974.

Lykes collected $53,040.87 in freight charges. Claiming that it had made a technical error in the quotation of the applicable rate, Lykes requested permission to waive collection of $34,656.48 of the freight charges assessed on the shipment.

The Presiding Officer issued an initial decision denying the application on the ground that Lykes' error was not an error in a tariff of a clerical or administrative nature or an error due to an inadvertent failure to file an intended rate, as contemplated in P.L. 90–298, which amended section 18(b)(3) of the Shipping Act, 1916 (the Act).

Complainant excepted to the denial of the application.*

We concur in the Presiding Officer's denial of Lykes' application. However, our reason for denying the application is, simply stated, that Lykes failed to comply with a specific statutory prerequisite. Under

*In view of our disposition of this case we need not discuss Complainant's arguments on exceptions.

section 18(b)(3) of the Act, the Commission may, in certain circumstances, at its discretion and for good cause permit a common carrier by water in foreign commerce to refund or waive collection of a portion of freight charges,

> *Provided* . . . That the common carrier . . . has, prior to applying for authority to make a refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based:. . . .
> *And provided further,* that application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment. 46 U.S.C. 817(b)(3).

Respondent has not, prior to applying for permission to waive collection of a portion of freight charges, filed with the Commission a tariff setting forth the rate upon which the waiver would be based. The application must therefore be denied. *Oppenheimer International Corp. v. Moore-McCormack Lines, Inc.*, 15 F.M.C. 49 (1971). Since more than 180 days have elapsed from the date of shipment, it is now too late for the carrier to file a new tariff and thereafter refile the application. No relief, therefore, can be granted under the "special docket" procedure set forth in section 18(b)(3) of the Act as implemented by Rule 6(b) of the Commission's Rules of Practice and Procedure. 46 CFR 502.92(a).

This does not preclude, however, Complainant's filing a complaint under section 22 of the Act, alleging the violation of any section of the Act, such as sections 16 or 17 and asking reparation for any injury caused by such alleged violation.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 469

PERKINS-GOODWIN CO., INC.

v.

LYKES BROS. STEAMSHIP CO., INC.

Application denied..

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

By application filed March 6, 1975, Lykes Bros. Steamship Co., Inc. requests authority to waive collection of a portion of the freight charges applied to a shipment of 374 rolls of paperboard weighing 894,244 pounds and measuring 32,700 cubic feet carried per bill of lading dated September 12, 1974, on Lykes vessel *Christopher Lykes* from New Orleans to Mombasa, East Africa. When the shipment was booked on June 28, 1974, a rate of $100.75/2240 pounds was quoted.[2] However, at the time of shipment, the applicable rate, effective August 15, 1974, was $78.50 W/M.[3] Accordingly, the shipment was rated on a measurement basis which resulted in a higher charge than if it had been rated on the weight basis set forth in the earlier tariff of rates.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based.

[1] This decision became the decision of the Commission October 14, 1975.

[2] South and East Africa Conference, South Bound Freight Tariff No. 1, FMC No. 2, Fifth Revised Page 161, Cancelling Fourth Revised Page 161, Effective Date May 15, 1974, Item No. 430.

[3] South and East Africa Conference, South Bound Freight Tariff No. 1, FMC No. 2, Sixth Revised Page 161, Cancelling Fifth Revised Page 161, Effective Date July 19, 1974, Item No. 430.

The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

Applied to the facts it appears that these requirements have not been met. Whatever the carrier's error may have been, it was not an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff that the exemption in Public Law 90–298 contemplates. Misquotation of rates is not a ground for relief thereunder.[4] Since the exemption embodied in Public Law 90–298 is inapplicable, then the rule in *Louisville & N.R.R. Co. v. Maxwell*[5] by direction of *Cunard*[6] obtains:

> Ignorance . . . of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

Accordingly, the application of Lykes Bros. Steamship Co., Inc., for authority to waive collection of a portion of the freight charges on a shipment of 374 rolls of paperboard must be denied.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
June 6, 1975..

[4] Special Docket No. 462, *Commodity Credit Corp. v. Delta Steamship Lines Inc.*, ____F.M.C.____, 14 SRR 1207 (1974).
[5] 237 U.S. 94, 97 (1915).
[6] *U.S. Nav. Co. v. Cunard S.S. Co.*, 284 U.S. 474 (1932).

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

SUBCHAPTER B—REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

[DOCKET NO. 72-41; GENERAL ORDER 35]

November 4, 1975

Part 551—Truck Detention at the Port of New York

By Notice of Proposed Rulemaking published in the *Federal Register* on August 23, 1972, the Commission served notice that it intended to promulgate certain rules and regulations to implement an equitable solution to the delays in the handling and interchange of freight between ocean and motor carriers experienced at the Port of New York. Comments from interested parties were solicited. These proposed rules are intended to supersede the truck detention rules promulgated by the Commission in Docket No. 1153, *Truck and Lighter Loading and Unloading Practices*, 12 F.M.C. 166 (1969). Following publication, and in response to a petition filed by Middle Atlantic Conference, the Commission issued an Amended Notice of Proposed Rulemaking providing for filing of responses to comments. Eighteen comments were submitted in this proceeding by, or on behalf of, a wide range of interested parties. Replies to these comments have been filed by Hearing Counsel and 11 answers to Hearing Counsel's replies have also been submitted. Subsequent to the submission of these answers, Hearing Counsel petitioned the Commission to take testimony limited to the factual issues surrounding section 551.2(a)(i) [section B(1)(a)]* which precludes prelodging of delivery orders and dock receipts at marine terminal facilities at the Port of New York on the grounds that there appeared to be disputes of fact concerning the present practice of prelodging documents, operational and procedural problems caused by such prelodging, and acceptable alternatives to the prelodging rule. The Commission, noting that with the exception of those comments filed pertaining to the prelodging rule it had

*The provisions promulgated herein have been renumbered to conform to established Commission numbering system and *Federal Register* procedures. We have made reference, as exhibited in brackets, to the corresponding section as originally proposed.

sufficient information to promulgate a final rule, granted Hearing Counsel's request and directed that the Administrative Law Judge issue a recommended decision thereon.

Administrative Law Judge Charles E. Morgan issued his Initial Decision on the prelodging issue to which exceptions and replies thereto were filed. The positions of the various parties on the prelodging of delivery orders and dock receipt are discussed herein. Also, because of the many and varied revisions incorporated into our final rule, we have discussed below certain other portions of the rule and the comments submitted with respect thereto. Our final rules promulgated herein have been drafted with careful consideration given the parties. Comments and arguments not specifically discussed or reflected herein have been nevertheless considered and found not relevant nor material.

Section 551.1(b) [section A2] defines a terminal operator. One commentator urges us not to exclude from that definition "marine terminal facilities operated or controlled by the Department of Defense." We find such a request to be inconsistent both with the provisions of 46 CFR 533.3 and with the policy of avoiding conflict between agencies of the U.S. government which might result from an attempt by one such agency to regulate the activities of another. However, in order to make clear the scope of these regulations, we have limited the applicability of the "terminal operator" definition to the "purposes of this Part."

While no specific comments were directed to section 551.1(c) [section A3], which identifies the type of entities which will be subject to the tariffs of terminal operators, we have, for the sake of clarity and consistent with the suggestion of Hearing Counsel, amended section 551.1(c) by inserting the word "including" between the terms "terminal operators" and "steamship companies acting as terminal operator."

Section 551.1(d) [section A4], which identifies the types of persons who "shall be entitled to receive remuneration in accordance with the provisions of this Rule," has been amended to clarify who is to ultimately benefit from charges collected pursuant to these rules.

Several parties commented on section 551.1(g) [section A7], which sets forth the conditions under which "a terminal" operator would not be assessed a penalty under these rules "if receipt or delivery of cargo . . . is prevented or delayed." In addition to strikes, work stoppage, and several unusual weather conditions, we are asked to include "acts of God," "fires," "serious accidents," "work slowdowns," and "congestion in anticipation of a strike of longshoremen or following the termination of such a strike." One party who opposes this suggestion sees no reason why the terminal operator should be excused from compliance with the rules, and therefore, rather than expanding the proposed exceptions would limit the existing exception to those instances where the "strike" or "work stoppage" is not the result of a violation of the collective bargaining agreement between the terminal operator and its employees.

While we sympathize with those parties who want to add "congestion" and "work slowdown" to the list of exceptions, we are nevertheless in full agreement with the position of Hearing Counsel that terminal operators cannot absolve themselves of all of their responsibilities under this rule. The objective behind this provision is to incorporate the distinction previously drawn by the Commission between work slowdowns and insufficient equipment which tends to delay operations, *and* strikes, work stoppages, or unusual weather conditions or other such causes which terminate operations. The former is the responsibility of the terminal operator; the latter is beyond his control, relieving him of detention payments. See *Truck and Lighter Loading and Unloading Practices, supra,* at 170, notes 170. Thus, since it is our intention that terminal operators be free from liability for situations over which they have no control, we have expanded section 551.1(g) to include acts of God, fires, and serious accidents as causes absolving the terminal operator. The question of whether or not a particular condition is so severe as to exonerate the person against whom a claim is made is the subject of section 551.1(j) [section A10].

Section 551.1(h) [section A8] sets out other conditions under which a terminal operator will not be liable for delay. One commentator suggests that this section be amended to make it clear that the existing trade practice whereby the terminal operator is required to sort/separate shipments on a single bill of lading by marks will continue to be permitted. In response thereto, another party points out that this section does not prohibit receipt or delivery of cargo by marks and numbers or any other service requiring the sorting of cargo, other than by bill of lading, at the request of the shipper, consignee or motor carrier, but merely excludes such shipments from the coverage of the proposed rule. The purpose of section 551.1(h) is to provide that the shipper-importer will be responsible for delays where the terminal operator is required to sort or separate shipments by marks. Additionally, and since, as was pointed out by one of the parties, terminal operators are required as part of their operations to segregate incoming/outgoing shipments by bills of lading, section 551.1(h) contemplates that as to a single motor carrier loading/unloading multiple LTL shipments, time, for purposes of this rule, shall not be computed separately for the loading/unloading of each shipment, as urged by one of the parties, but rather shall accrue during the entire time the vehicle is being loaded/unloaded. This, however, should not be confused with section 551.2(a)(2) [section B.1(b)], dealing with several vehicles picking up/delivering multiple shipments on a single delivery order/dock receipt, where time shall be computed separately for each vehicle loaded/unloaded on an open delivery order or dock receipt. Finally, section 551.1(h) has been amended to reflect Hearing Counsel's suggestion that terminal operators not be held liable for delays caused by U.S. government regulations.

We find merit in one party's observation that if procedures on the

docks are to be sped up, it must be realized that delay is incurred by motor carriers with regard to empty as well as stuffed containers. Consequently, we have modified section 551.1(i) [section A9] by the addition of the following sentence: "For purposes of this Part, 'containers' shall include empty as well as stuffed containers."

Section 551.1(k) [section A 11] establishes procedures to be followed by terminal operators who elect to deliver breakbulk cargo to motor carriers prior to full discharge and is not concerned, as one of the commentators believes, with situations involving the stripping of containerized cargo. Moreover, this section does not require but merely permits the terminal operator to effect delivery before the vessel is discharged. Because section 551.4(i) [section D9] makes it the responsibility of the consignee or his agent (motor carrier) to determine when a cargo is available (at nonappointment piers) and section 551.3(b) [section C2] will not allow appointments unless the cargo is properly available, the terminal operator has to advise the motor carrier only when the cargo is so available. For example, until breakbulk shipments have been stripped from the container, there is nothing which obligates the terminal operator to make delivery as soon as the vessel discharged its unstripped containers.

Another party suggests that because the documents in the possession of the terminal operator do not always show the identity of the motor carrier that will pick up the cargo, language should be added to section 551.1(k) requiring the terminal operator to make a reasonable effort to ascertain the party to receive such notice and effect the same. We question the practical necessity of such a revision since it is only reasonable to presume that the terminal operator would, in the interest of sound business practice, make all reasonable efforts to contact the appropriate person in order to have cargo removed from the pier prior to full discharge. Common sense would likewise dictate that if this person cannot be ascertained, no notification would be issued. Nevertheless, in our final rule we have substituted "the consignee or its designated agent" for "motor carrier" as the person to be notified by the terminal operator. Lastly, we agree with the suggestion of one commentator that in order to avoid any question as to whether, in fact, authority was or was not given, section 551.1(k) should be modified to require that the terminal operator employee authorizing the delivery of cargo prior to the vessel being fully discharged be identified.

Section 551.1(l) [section A 12], in effect, allows the terminal operator the option of selecting the system under which it will operate. One party is of the opinion that the terminal operator will opt more often for the nonappointment system where detention time begins to run from the time validated on the gate pass as provided in § 551.6(b). In this regard, it is argued that this section should be amended to operate in harmony with ICC tariffs by deleting the nonappointment and combination procedures and keeping only the appointment system wherein truck detention time

begins when the motor carrier arrives at the gate. We cannot agree. To implement such a suggestion would, in our opinion, deprive the terminal operator of the prerogative to institute a procedure that would best implement the objectives of the proposed rules. The proposed rules are geared toward the expeditious loading/unloading of cargo which of necessity entails a smooth procedure between the terminal operator and motor carriers and are not concerned with the relationship between motor carrier and shipper. Our final rule, however, reflects the suggestion of two of the parties that section 551.1(l) be modified to require that any change in the procedures at a given pier should only be made on thirty (30) days' notice and upon the filing of an appropriate tariff amendment effecting such change.

Section 551.2(a)(1) [section B1(a)], as originally proposed, prohibited the prelodging of delivery orders and dock receipts. Upon review of the record in this proceeding we remain convinced that prelodging of delivery orders causes not only delay and congestion but also sets the stage for what could become serious security problems at the Port. As concerns the former, we find merit on one party's observation that an incomplete prelodged delivery order causes not only delay to the motor carrier concerned while the receiving clerk perfects the delivery order or prepares a new one, but also hinders the progress of the other trucks who have the proper documentation but cannot proceed until the initial problem has been resolved.

Some commentators argue that not only will prelodging not unnecessarily impede the free movement of import cargo, but a prohibition of prelodging will result in additional expenses for shippers and consignees using the Port. In support thereof, it is contended that the prelodging of delivery orders is necessary because of the five-day limit on free time on imports. With fast container service and slow mails, it is submitted that the customhouse broker is occasionally delayed in processing the import, especially if the goods arrive in several containers, to the point where free time is about to expire and therefore must telephone the pickup order to the motor carrier and lodge the delivery order at the pier if the trucker is to get his goods before his free time expires. Also, it is argued that by prelodging the delivery order the clerk can verify, in advance of the arrival of the motor carrier, that the freight has been paid and the original bill of lading has been delivered to the ocean carrier, a procedure that allegedly can cut down on delays. Whatever the merits of these arguments, the fact remains, as the Administrative Law Judge found, that when a trucker does not have in his possession a full and complete delivery order upon arrival at the pier, delay *in fact*, occurs. The movement of cargo from the piers is appreciably slowed down while the terminal personnel are straightening out the problems created by an incomplete or lost prelodged delivery order. One of the purposes of this proposed rule is to better define the responsibilities of all parties involved

at the Port for the expeditious interchange of cargo. We believe a prohibition on prelodging delivery orders is consistent with such purpose.

Except to the extent the Administrative Law Judge recommended that a $15 fee be levied for the handling of each prelodged dock receipt discussed in detail *infra,* we agree with his findings as they relate to the practice of prelodging such documents. Exceptions taken to the Administrative Law Judge's conclusion that the prelodging of dock receipts does not cause any significant truck detention at the Port reiterate the arguments supporting the prohibition of the prelodging of delivery orders, the essence of which is based on allegations of port congestion and delay in service. It is their position that it would be just as easy to hire a special messenger to deliver the dock receipt to the truck terminals within the Port area, as it is to deliver them to piers. We disagree. Such a procedure would be expensive for the shipper since the messenger would more often than not just "wait around" truck terminals to meet motor carriers. Moreover, and considering the traffic problem in and around the city, it would be most impractical to meet the motor carrier and/or "gypsy truckers", who has no truck terminal, at a predetermined place. In any event, there has been presented ample evidence that delay at the Port is not due primarily from the prelodging of dock receipts, which, as a matter of record, occurs only with a small percentage of export cargo, but instead is due to the prelodging of delivery orders.

Finally, there are those situations where prelodging of the dock receipt is the only practical solution if there is to be a prompt receipt of the export cargo in order that the motor carrier can unload as soon as it arrives at the piers. For instance, and as observed by the Administrative Law Judge, when the exporter wished to take advantage of infrequent sailings by utilizing overnight shipments (i.e., shipments which leave the point of origin the night before and arrive at the docks the following morning), the forwarder, of necessity, must prelodge the dock receipt at the marine terminal in lieu of delivering it to a truck terminal. Similarly, the prelodging of dock receipts at the pier is more desirable than to have to decide as to which of at least two carriers involved with long-haul shipments will be the recipient of the dock receipt; particularly, since truckers "swap" tractors and trailers, and may go directly to the pier or to a local delivery agent for pier delivery.

Additional support for the prelodging of dock receipts derives from the Administrative Law Judge's finding that "exporters frequently are unaware of exactly when goods will be ready for transportation to the Port of New York." This means that the forwarder is unable to obtain the "pro and con" numbers of the motor carrier transporting the goods until the last minute and it is only at this time that the forwarder is able to begin to estimate the transit time from the inland point to the docks. Moreover, and because terminal facilities are subject to the handling of the excessive amounts of import/export shipments and labor problems, there are times

when the forwarder will not know until just before arrival of the vessel the specific pier for delivery.

We also find considerable merit in the Administrative Law Judge's observations that prohibiting prelodging of dock receipts would: (1) disrupt pre-reserved shipping space since, in many instances, the ocean carrier transporting the goods will insist on knowing, in advance, the size and amount of the shipment it has "booked"; and (2) be unwise because it could lead to the misuse of blank dock receipts which would have to be left at inland points if no prelodging is permitted. As long as the prelodging practice is not abused, we believe it will be to the advantage of the users of the Port to continue its use. In conclusion, therefore, while we do not deny that it would be more beneficial for the trucker to have the dock receipt in his hand when he arrives at the pier, the practicalities involved in the export of goods require, under certain situations, prelodging of dock receipts.

The Administrative Law Judge also recommended a $15 service charge for prelodging, noting that since the time and expense involved in handling prelodged dock receipts was for the convenience of the forwarder or exporter, the cost of such service should be borne by them and not by all who use the marine terminal operators' service (in the form of higher stevedoring rates). We do not agree. We agree with the position taken by those parties who oppose this $15 assessment fee on the ground that it will work only as a penalty by unreasonably burdening the shipper who is trying to export his product as quickly and cheaply as possible. Further, such a fee could well drive the small inland shipper out of business since he would not be able to absorb a $15 charge in his selling price of exported goods without running the risk of pricing his product out of the competitive market. As a result, a service charge might, under the circumstances, give rise to an unreasonable preference in favor of large volume exporters who obviously could absorb such a charge. Such a charge could also cause prospective exporters to avoid the Port as well as present exporters to divert their shipments to other less expensive ports, all to the financial disadvantage of the Port.

For the aforementioned reasons, we have modified the final version of section 551.2(a)(1) to reflect a prohibition of the prelodging of delivery orders but to allow the continuance of the practice of prelodging dock receipts without any service fee.

We have further modified section 551.2(a)(1) to permit time stamps and notations on gate passes and other arrival documents to be duplicated on the trucker's copy of the delivery order or dock receipt, instead of on a blank paper as originally proposed. The existence of a blank piece of paper is just another document that would be susceptible to being lost or stolen. We see no reason to further complicate the paperwork involved. Moreover, and as one party points out, the time stamp on a copy of the dock receipt or delivery order retained by the trucker would be helpful in the processing of future claims.

Section 551.2(a)(2) [section B1(b)] pertains to a motor carrier's use of the open delivery order/dock receipt. One party suggests that to allow a motor carrier to continue the established and accepted practice of presenting open documents on less than truckload (LTL) shipments will compound the problem of cargo security at breakbulk terminals. We disagree. Quite the contrary, by permitting a terminal operator to establish his own safeguards for the handling of LTL shipments, which he would do by filing the appropriate procedures in his tariff, security would, we feel, be improved. This conclusion is based on the fact that each procedure for physically handling cargo across the platform will, necessarily, take into account security considerations peculiar to that breakbulk terminal facility. In our final rules, we have adopted Hearing Counsel's suggestion that the terminal operator be required to establish procedures by which the motor carrier, subsequent to the receipt or delivery of the initial load, would have to exhibit satisfactory authorization before picking up or delivering the "remaining truckloads or shipments." The substitution of this language for the word "cargo", as originally proposed, will alleviate any confusion as to what the motor carrier has authority to pickup or deliver.

Several parties commented on section 551.2(b) [section B2] which sets forth the information to be included within a dock receipt. Comments addressed to this provision range from suggesting that the dock receipts requirements be "in exact conformity" with the U.S. Standard Master, to urging that the terminal operator be allowed complete discretion to determine the form or content of the dock receipt. We cannot accede to either suggestion.

While we are not opposed to a dock receipt in the form of the U.S. Standard Master, the party making such suggestion is not clear as to whether its contents will only include that as required by section 551.2(b) of our rules, or would supplement the existing information already present on the U.S. Master Standard. Further, any suggested change in this section that would dilute our requirements, such as one party's proposal that terminal operators be allowed to impose their own documentation requirements, would destroy the effectiveness of the rules by undermining our objective of standardizing documentation throughout the Port. As another commentator aptly pointed out the laxity and arbitrariness of documentation procedures have been *among* the major causes of truck delays and disputes between motor carriers and terminal operators. Consequently, in the interest of standardization and giving due regard to allowing terminal operators some flexibility, section 551.2(b) has been revised to provide a terminal operator the discretion to vary the format of a document while requiring him to embody information therein to be applicable portwide. In order that the dock receipt will reflect all pertinent information necessary to expedite the movement of cargo, we have revised the final section 551.2(b) to include certain substantive changes as

suggested by the parties, which we believe would help further to eliminate haphazard documentation.

Section 551.2(c) [section B3], as originally proposed, required the use of a particular delivery order form containing certain specific information. At the outset, we would point out that all concerned would benefit from a standardized delivery order form since it would reduce paperwork and simplify the processing of such documents. However, with the introduction of Customs' new form 11–RC–450, both our proposed standardized form and another party's proposed replacement which would be aligned to the U.S. Standard Master have become incompatible with the purpose of the truck detention rules; i.e., requiring the motor carrier to have in his possession documents encompassing the information necessary to quickly gain access to the piers for the delivery or pickup of cargo. Without substantial modification, or at worst, separate preparation, of the aforementioned forms, it would become impossible for either of the forms to conform to the changes affected by this new Customs' form.

Nevertheless, the consensus of the parties hereto is that all that is needed for the proper delivery of cargo is a document containing information sufficient to properly identify the shipment to all parties concerned and to authorize its delivery. We agree. The use of such a document will not compromise the needs of the motor carriers, terminal operators, ocean carriers and others engaged in the interchange of cargo at the Port of New York. Therefore, for reasons of security, simplicity, and expedition, delivery orders to be used need only contain the information outlined in section 551.2(c) herein.

We have incorporated into our final rule suggestions regarding information required to be in the delivery order which would not have an adverse effect on cargo security and the control of cargo. The remaining comments have been found to be of minimal value towards the adoption of a practical and useful delivery order. Lastly, we would explain that the term "address of the terminal" as used in section 551.2(c)(2) [section B3(b)], refers to the terminal designation (i.e., Berth No., Port Elizabeth) and not the street address.

Because of the similarity of originally proposed sections B5 and B6 they will be discussed together. The combined effect of these two sections is to allow the terminal operator to refuse to complete or correct the documents necessary to effect the pickup or delivery of cargo. Three parties object to granting the terminal operator this option, arguing that the terminal operator would abuse his discretion to the extent of arbitrarily turning away the motor carrier. Therefore, we are asked that both provisions be modified to require the terminal operator to complete incomplete, or correct deficient documents with the charge for such service shifted to the shipper in lieu of the motor carrier as presently required by section 551.7(c) [section F3] of our rules.

In reply, Hearing Counsel point out that: (1) the efficacy of our truck detention rules is predicated upon the working relationship between motor

carriers and terminal operators, not the shipper and terminal operator; and (2) any economic hardship that may befall the motor carrier effected by the terminal operator, is a direct result of its own action. Obviously, if the motor carrier does not request such services from the terminal operator, he will have to return to the pier after the documents are corrected or completed. More important, we consider the procedure as outlined in sections B5 and B6 as the fastest method of correcting inaccurate and/or incomplete documents which, as all parties agree, have been a continual source of delay, congestion and confusion at the Port.

In response to a suggestion advanced by Hearing Counsel, we have consolidated the language of sections B5 and B6 into one section, designated section 551.2(e) and redesignated proposed sections B7 and B8 as sections 551.2(f) and (g), respectively.

Section 551.2(f) [section B7] requires that a terminal operator provide a written statement to the motor carrier explaining the former's reason for rejecting documents. The purpose of this requirement is not to create additional paperwork, as suggested by one party, but rather to eliminate disputes and/or misunderstandings and allow the parties concerned to document delay and thereby attribute fault.

Section 551.2(g) [section B8], as originally proposed, required that any authorization for the delivery of cargo from one location to another in certain specific enumerated circumstances must have the written approval of the ocean carrier involved. This section further required that any delay occasioned thereby be excluded from computation of penalty time. Upon review of certain of the comments we agree with Hearing Counsel that since this section affects only the relationship between steamship companies and terminal operators, the final determination as to whether authorization should be oral or written should be left to the discretion of the parties concerned. We are not persuaded by the argument of one of the parties that this will put the terminal operator at a decided disadvantage where the steamship company claims the delivery of cargo was not authorized.

We do, however, find merit with one commentator's argument that because any delays caused by the changes described in this section are matters both within the control of and for the benefit of the steamship company or terminal operator, depending on the circumstances, neither should be absolved from liability. The shipping public should not be penalized because either of the persons in issue elect to make a change in their operations without adequate opportunity to correct documents to reflect the change.

In view of the above, section 551.2(g) has been revised to delete the "in writing" requirement and to provide that the delay occasioned in certain circumstances shall be chargeable to the party responsible for such change.

Sections 551.3, 551.4 and 551.5 [sections C, D, and E], generally set forth the various procedures to be employed at a terminal under the

appointment system, nonappointment system, and a combination of both. Here it should be pointed out as a general matter that while the Port Adjudicator is authorized to settle disputes concerning specific claims submitted pursuant to this Part, this will in no way oust the Commission of jurisdiction under section 17 of the Act.

We have modified section 551.3(a)(2) [section C1(b)] to require the terminal operator to identify the terminal operator employee granting the appointment, in addition to listing the information already required by this section. In case of disputes, such additional information will make it easier for a person requesting an appointment to substantiate that an appointment was granted.

Section 551.3(b) [section C2] relates under what circumstances the terminal operator shall grant an appointment. In response to the comments of two of the parties, we have modified this section to make it clear that the term "freight release" means the notification by the steamship company to the terminal operator that conditions precedent to the release of the cargo have been satisfied.

As originally proposed, section 551.3(c)(1) [section C3(a)] required motor carriers to arrive 15 minutes prior to his scheduled appointment. Certain commentators argued that such a time requirement does nothing to enhance efficiency, particularly when service is provided at a predetermined time. We agree. Since under our rules the motor carrier will be required to have in his possession the necessary documentation to gain access to the piers prior to receiving a gate pass, the deletion of such a time requirement would be consistent with the purpose of avoiding delay. Consequently, we have amended our final rules to provide that a motor carrier need only arrive on time to proceed directly for pickup or delivery of cargo.

Section 551.3(d) [section C4], as proposed, establishes when the computation of time begins at an appointment terminal but excludes therefrom delays caused by the action/inaction of the Bureau of Customs or other governmental agency. Because of Customs' refusal to time-stamp or otherwise document the length of time consumed by Customs' clearance of documents, we concur with certain parties that the original section 551.3(d) should be revised as suggested by Hearing Counsel. By separately setting out when the gate pass for either a dock receipt or delivery order will be time stamped, we are able to avoid the problems incurred by the procedures of Customs. Thus, while a gate pass for a dock receipt will be stamped immediately by terminal personnel, the stamping of the gate pass for a delivery order will not be effected until the motor carrier has proceeded through Customs.

We have also incorporated into our final rules a new section 551.6 [section F] "Computation of Time". In effect, this new section will accomplish the same objectives as proposed section C4, that is, to establish a fixed point for the computation of time which takes into

consideration delays as to which the terminal operator can demonstrate that he was not responsible.

Section 551.4(a) [section D1] requires that service periods be established for each business day at a terminal operating on a non-appointment system. One party proposed that this section should also include the requirement that the terminal operator publish in its tariff the daily capacity of each terminal facility and the number of vehicles to be scheduled in each service period. We do not agree. The purpose behind this section is to grant the terminal operator flexibility in determining capacity which can change from day to day, depending on numerous factors. To adopt the revision suggested would, we feel, stifle any effect that this section would have in alleviating congestion at the Port. Accordingly, we have adopted section D1 as proposed and redesignated it section 551.4(a).

Sections 551.4(c) and (d) establish the procedure for the issuance of a time-stamped gate pass which will institute free time for the motor carrier in delivering or picking up cargo. Before discussing specific objections hereto, we would point out that the dock receipt/delivery order, itself, constitutes the basis for the issuance of the gate pass which is merely being used as an internal control measure. Therefore, to clarify any misunderstanding, it should be pointed out that the dock receipt/delivery order is checked for form and authenticity prior to, and not after, the issuance of the gate pass. However, admission to the pier will not be conditioned upon the examination of the substantive contents of the document. Possession of the document is sufficient.

In commenting, one party suggests that the validation time, controlling entry to the pier for motor truckers with dock receipts/delivery orders, include not only the time stamp on the gate pass, but also the time entered in the terminal operator's security log as is presently being done at this party's terminal. In effect, we are asked to require motor carriers, upon receiving their time stamped gate pass, to proceed to the delivery/receiving clerk's office for the purpose of being time recorded in the terminal operator's security log. The benefit of such a procedure, we are told, is that it will discourage the motor carrier from taking a "break" en route from one point to another. We see little merit in this proposed additional requirement. To permit a terminal operator to record a different time in its own records for the commencement of free time is contrary to the very purpose of our validation and entry procedures under which the validation time on the gate pass constitutes the official time for the commencement of free time.

Comments were also directed to certain procedures of section 551.4(d) [section D4]. This section, in pertinent part, provides that Customs' processing would be initiated immediately upon admission to the terminal facility and that a Customs' time stamp would be issued at the completion of such processing. Thus, the time between the validation time on the

gate pass and the time stamp of Customs would be excluded from the time allowances provided for loading without penalty. For various reasons, the substance of which need not be discussed, Customs has informed us that it will not issue time stamps. Because Customs' clearance is an integral and necessary step in the delivery of imports, any detention rule must be compatible with the procedures of Customs. Therefore, we have adopted in our final rules Hearing Counsel's revision of sections 551.4(c) and (d). These new provisions not only eliminate the requirement that Customs time stamp documents but also simplify the procedure by allowing the motor carrier, upon the validation of his gate pass on arrival at the pier, to proceed directly to Customs for the processing of his papers. Thereafter, the motor carrier's papers are presented to the delivery clerk of the terminal operator for the stamping of the gate pass, at which point, time for purposes of detention commences. Under the procedure for validation and computation of time in section 551.6 [section F], the time consumed (1) in obtaining Customs' clearance for delivery orders, and (2) between the issuance of the time stamped gate pass and the subsequent time stamping thereon by the receiving clerk for dock receipts, is excluded from the time for detention purposes.

Further, Hearing Counsel's substitutions are consistent with the purpose of the original sections 551.4(c) and (d); i.e., placing the responsibility on the shipper and motor carrier for preparation and presentation of correct documentation. As presently worded, sections 551.4(c) and (d) will stop the current practice of motor carriers being denied entry to the piers because of improper documentation.

Section 551.4(e) [section D5] allows the motor carrier to elect to receive a preference slip entitling the motor carrier to service on the next business day within 30 minutes after issuance of a gate pass. One party alleges that this procedure would be susceptible to abuse by the motor carriers. We do not agree. This section is intended to prevent favoritism toward certain motor carriers by terminal operators by assuring that all motor carriers will be treated equally. As pointed out by another commentator, preference slips are: (1) an integral part of the time slot or service period procedures which recognizes that every pier has a maximum capacity; and (2) they encourage orderly scheduling of nonappointment vehicles.

In adopting section 551.4(e) we point out that security problems will not be aggravated since the vehicle arriving for service under a preference slip must still possess a delivery order/dock receipt.

Section 551.4(f) [section D6] permits the terminal operator to turn away carriers when the capacity of a terminal facility has been reached but not before issuing these carriers preference slips for service on the next business day. This section will alleviate the problem of motor carriers being turned away without service after having waited in line for several hours.

One party asks that we delete section 551.4(f) in its entirety, urging that

since all motor carriers have received notice that the cargo is ready, every vehicle which arrives at the pier should be served. We disagree. While the fear of abuse of discretion by the terminal operator may have some theoretical merit, the practicalities of the situation dictate that terminal operators will want cargo removed from their facilities as rapidly as possible. Therefore, it is doubtful that vehicles will be turned away capriciously if service of those vehicles is feasible. Moreover, a rule which would require a facility to exceed its capacity would not be workable.

Once the terminal has decided to turn away the motor carrier with a preference slip, there is nothing in the rules that requires the terminal operator to reconsider his decision. Therefore, a motor carrier cannot insist on being admitted and serviced to completion. This situation should allay the fears of one party who was concerned as to who would pay for the overtime incurred if a motor carrier could successfully insist on completed service.

Additionally, to complement the requirements of sections 551.2(a)(1) and 551.6, we have adopted, as part of our final rules, Hearing Counsel's proposed modification to the last sentence of section 551.4(f), to wit:

> . . . The preference slip shall be attached to the gate pass when said gate pass is issued and all notations recorded on the preference slip shall be duplicated on the motor carrier's copy of the delivery order or dock receipt.

Section 551.7(a) [section G1], as originally proposed, assessed a $15 penalty against a terminal operator for refusing service to a motor carrier possessing complete documentation. An unjustified refusal to serve a motor carrier results in confusion at the pier, loss of valuable time to the motor carrier, and a loss of revenue for everyone concerned. Consequently, the terminal operator must be given the incentive to minimize or avoid such confusion. Having reviewed the comments, we conclude that the avoidance of this confusion can best be achieved by increasing the penalty from $15 to $30 rather than by introducing a sliding scale of penalties up to $60 as suggested by one party. This rule does not contemplate that "penalties" be compensatory but rather that the charge will encourage accuracy and efficiency. Accordingly, our final rules provide a $30 penalty for denial of service due to the fault of the terminal operator.

Section 551.7(b) [section G2] assesses a $15 penalty against the motor carrier for failing to meet an appointment. We have rejected one party's suggestion that this section be amended to provide that a motor carrier be excused from any penalty for such failure if it is due to the reasons as provided in section 551.1(g). To do as this party urges would only cause endless dispute over the cause of the missed appointment. If the purpose of these rules is to be achieved, the motor carrier must act responsibly in its dealings on the pier.

However, we do find merit in another party's observation that section

551.7(b) should take into consideration the situation in which the motor carrier fails to meet an appointment and the terminal operator has furnished special equipment at the pier. Accordingly, we have added a second sentence to section 551.7(b), which reads: ". . . If, pursuant to section 551.3(b), a motor carrier is advised that special equipment will be required and the motor carrier fails to meet said appointment, the motor carrier shall be subject to a charge of $30." We conclude that the $30 penalty is sufficient incentive for the motor carrier to keep its appointment.

Section 551.7(c) [section G3] requires the terminal operator to charge the motor carrier a $15 penalty for completing or correcting deficient documents. Eight parties commented on this section. Three parties argue this penalty is unreasonably high and unwarranted unless every steamship company, terminal operator and exporter/importer is obligated to pay penalties for every mistake or clerical error made. It is further suggested that the $15 penalty will create an extremely unhealthy climate between the affected parties because the motor carrier does not prepare the documentation and disputes over minor corrections will be encouraged. An additional argument urges that, since this fee will be passed on, the result will be to discourage use of the Port.

Hearing Counsel defend the $15 as an appropriate charge encouraging more care in the preparation of the pertinent documents. We agree.

Notwithstanding fears expressed by certain parties regarding possible abuse of these penalty provisions, sound business practices would dictate wise use of discretion before assessing the $15 penalty.

Section 551.7(d) [section G4], as proposed, stated that if a motor carrier seeks and gets a schedule appointment prior to issuance of a freight release of the subject cargo, the motor carrier will be penalized $15. Upon review of the comments, we concur that the proper party to be assessed the penalty is the terminal operator. As certain parties pointed out, the freight release involves communication only between the steamship company and the terminal operator. Thereafter, the terminal operator then notifies the broker that the goods are ready for pickup, and the broker in turn calls the motor carrier to come and collect the cargo. Hence, the motor carrier does not know whether a freight release has been issued or not unless he is so informed by the terminal operator. Consequently, we do not believe that the motor carrier should be penalized for seeking a schedule appointment since it is unlikely that he would make a request for a schedule appointment unless the terminal operator had advised him (through the broker) that the freight release had been issued and the cargo was available.

We agree with Hearing Counsel that a $30 penalty, in lieu of $15 as proposed, is justified in view of time lost by the motor carrier when an error is made in notification.

Therefore, we have revised section 551.7(d) to provide for a $30 penalty assessed against the terminal operator.

Section 551.7(e) [section G5], as proposed, provides for the assessment of a $15 penalty against the terminal operator for wrongfully advising the motor carrier that cargo is ready and available. While four parties argue that a $15 penalty is inadequate, with one suggesting that it be increased to $65, a fifth party contends that any increase in penalty would tend to slow down the movement of cargo by encouraging over-zealous verification and reverification of simple facts. We cannot agree with the fifth party. Considering that the purpose of this section is to deter erroneous notification of available cargo and that, generally, considerable reliance is placed upon the terminal operator's word, we agree that an increase in penalty is appropriate. Consequently, the penalty provided in section 551.7(e) has been increased to $30.

It has also been suggested that this section require written verification that notification was made to facilitate motor carriers' proof that notification was given. Such a requirement, in our opinion, is an unnecessary burden on the terminal operator. It would not expedite movement of cargo but would merely reenforce any claims by motor carriers. Additionally, the fact that it is a costly operation for a motor carrier to make a second trip to the piers, creates a reasonable presumption that a motor carrier would not arrive at the piers without a prior notification to do so.

Section 551.7(f) [section G6] outlines the time allowances applicable to containers handled as a single unit and to noncontainerized cargo under an appointment/nonappointment system. Two parties argue that the allowances prescribed in this section should conform to those established by the ICC. Not to do so, they urge, will only serve to confuse shippers and to create unnecessary complications in billing for, and collection of, detention charges. Hearing Counsel argue that the ICC detention time provisions serve different objectives than those of this proposed rule. We agree.

The ICC rules permit reimbursement to the motor carrier for all delays at marine terminal facilities for which the motor carrier is not responsible. However, this reimbursement comes to the motor carrier from his principal who pays the charges. Our rules, which establish penalties for unreasonable delays for which the terminal operator is responsible, are designed to have the responsible terminal operator pay for the detention of the motor carrier. The key to our rule is the relationship of the trucker to the terminal operator and not of the trucker to its principal.

Further, we are persuaded that certain benefits will override any confusion that may occur from having two divergent detention charges. With the time-stamped gate pass, the trucker will be able accurately to compute the amount owed him by his principal. Further, that amount is subject to be offset in an amount equal to the detention charges collected from the terminal operator. This arrangement may also have the effect of encouraging importers/exporters to use the Port. Accordingly, we have incorporated section 551.7(f) as proposed, into our final rule.

Section 551.7(h)(1) [section G8(a)], as proposed, assesses a $65 penalty against the terminal operator who refuses service to a motor carrier holding an appointment when the refusal is due to a lack of manpower. Under this section it is no excuse, as noted by one party, that the terminal operator did not anticipate the needs of a particular cargo. We consider such a predicament to be preventable by foresight on the part of the terminal operator, and not a situation beyond his control. Implicit in this section is the obligation of the terminal operator to complete loading/unloading the motor carrier admitted to the terminal facility. A part of that obligation is the responsibility of the terminal operator to foresee labor problems which would tend to delay operations.

Additionally, because this section is designed to act as an inducement for orderly and efficient scheduling of motor carriers, we agree with Hearing Counsel that the penalty should be reduced to $30. A $30 penalty is consistent with other penalty sections of this Part. Therefore, we have adopted section 551.7(h)(1) as modified by the reduced penalty.

Comments on section 551.7(h)(2) were directed only to that portion which relieves the terminal operator of the $65 penalty if he refuses to service a nonappointment vehicle as a result of labor's refusal to work overtime. It is argued that because the terminal operator is responsible for its labor it should not be absolved from liability. Hearing Counsel reply that a refusal under the aforementioned circumstances is equivalent to a work stoppage, and under the theory of section 551.1(g) [section A7], the terminal operator should be relieved of any liability for the actions of labor under the circumstances. We agree.

Distinguishing this section from section 551.7(h)(1) wherein the terminal operator is liable for labor's refusal to work overtime, we would point out that a terminal operator has the time to anticipate the services that can be rendered with reference to motor carriers holding appointments while not so with nonappointments. Accordingly, we have adopted, as part of our final rule, section 551.7(h)(2) as proposed, except that for the same reasoning as employed in section 551.7(h)(i), *supra*, we have reduced the penalty to $30.

Section 551.8 [section H], in general, sets out the procedure for the submission of claims for penalties. Upon review of the comments, we find that many of the suggestions and rationale have considerable merit. Consequently in the final rule, section 551.8 has been revised to be more responsive to these constructive comments. This generally conforms to Hearing Counsel's proposal with certain minor modifications of our own.

We are in total agreement with those parties who submit that claim forms, as originally proposed, are unnecessary. For purposes of this rule, all that is necessary is a copy of the dock receipt/delivery order with its accompanying documentation supported by a brief explanation of the facts giving rise to the claim and the dollar amount of such claim. In accordance with section 551.2(a)(1), the necessary information will be

duplicated on a copy of the appropriate document which the motor carrier will always have in his possession.

While we agree with the basis of Hearing Counsel's proposed extension of filing claims from 15 days to 60 days, we believe that a 45-day period would be more reasonable. A 45-day period is quite enough time to discourage any possible laxity in preparation for filing a claim and at the same time will not prejudice the parties concerned. Further, we agree with the suggestion of one party that all periods of 15 days, as proposed by Hearing Counsel, should be expanded to 20 days so as to be more realistic and to increase the likelihood of compliance.

One party noted that the original proposed section H did not cover the situations where steamship companies are responsible for delays of trucks. The example cited is the premature issuance of a freight release resulting in the motor carrier being notified that the shipments are available when, in fact, they are not. We are told that the terminal operator might under the circumstances reject a claim on the ground that the delay was caused by the steamship company. In order to cure this deficiency, we have amended section 551.8(e)(1) [section H5(a)] to include the following language: ". . . or otherwise denies a claim on the ground that the delay was caused by the steamship company."

Therefore, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553), and the Commission's authority under sections 17 and 43 of the Shipping Act, 1916 (46 U.S.C. 816, 841a), Title 46 CFR is hereby amended.*

Effective date: These rules and regulations shall become effective 30 days after publication in the *Federal Register*.

By order of the Federal Maritime Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

*The text of the amendment is reprinted in 46 CFR Part 551.

FEDERAL MARITIME COMMISSION

No. 74–14

POSSIBLE VIOLATIONS OF SECTION 18(a) OF THE SHIPPING ACT, 1916, AND SECTION 2 OF THE INTERCOASTAL SHIPPING ACT ARISING FROM CHARGING HIGHER RATES THAN SPECIFIED BY CURRENT TARIFF

NOTICE OF ADOPTION OF INITIAL DECISION

November 6, 1975

No exceptions having been taken to the initial decision in this proceeding, and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on November 6, 1975.

In accordance with the conclusions reached in the initial decision and adopted hereby, it is ordered that Tariff FMC–F No. 1 of respondent Hawaii Freight Lines, Inc. is cancelled.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 74–14

POSSIBLE VIOLATIONS OF SECTION 18(a) OF THE SHIPPING ACT, 1916, AND SECTION 2 OF THE INTERCOASTAL SHIPPING ACT ARISING FROM CHARGING HIGHER RATES THAN SPECIFIED BY CURRENT TARIFF

Adopted November 6, 1975

Respondent Hawaii Freight Lines, Inc. (HFL), found to have offered a transportation service between San Francisco and Los Angeles, California, and Hawaii during the period commencing on or about June 27, 1968, and ending in early 1974 and to have offered such service as a nonvessel operating common carrier (NVOCC) subject to the provisions of the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933.

One such as HFL who held out to the general public to carry goods for hire so as to constitute a common carrier is not a shipper's agent although he may not own or operate transportation equipment.

One who operates as a common carrier will have liability for loss or damage to goods carried imposed upon him by law by virtue of his occupation and mere disclaimer of liability can have no bearing on the determination of his common carrier status.

A common carrier is such by what he does and how he operates and not by what designations he applies to himself.

HFL found to have violated section 18(a) of the Shipping Act, 1916, and section 2 of the Intercoastal Shipping Act, 1933, by charging rates higher than those specified in its tariff on file with the Federal Maritime Commission.

Since HFL has refused to respond to an order of the Commission to furnish information pursuant to section 21 of the Shipping Act, 1916, and has furthermore ceased operations, HFL's tariff is canceled.

William H. Dodd for respondent Hawaii Freight Lines, Inc.
Donald J. Brunner and *Joseph B. Slunt* as Hearing Counsel.

INITIAL DECISION OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE[1]

This proceeding was instituted by the Commission by means of an Order to Show Cause, served April 18, 1974. In this Order the Commission stated that respondent Hawaii Freight Lines, Inc. (HFL), had filed a tariff with the Commission on June 27, 1968, as a nonvessel operating common carrier (NVOCC) operating between San Francisco, California, and other West Coast ports to Hawaii. The Order recited furthermore that this tariff specified a rate for mixed freight (FAK) of 72¢

[1] This decision became the decision of the Commission November 6, 1975.

per cubic foot and also contained a clause (Item 200, Provision 4) limiting HFL's liability to damage occurring while cargo was in its personal possession and disclaiming liability for losses incurred during ocean transport unless the vessel was owned or demise chartered by HFL.

Although the Commission notified HFL that Provision 4 was inconsistent with its legal obligations as a common carrier and requested that an appropriate amendment be submitted, the Order stated that HFL did not submit such an amendment. Furthermore, on or about December 1, 1971, according to the Order, HFL began charging shippers an FAK rate of 78¢ per cubic foot without having submitted a revised tariff to the Commission and upon inquiry by the Commission, HLF stated that it was not a common carrier but rather a shipper's agent which could freely adjust its rates without filing tariffs with either this Commission or the Interstate Commerce Commission (I.C.C.) despite the fact that the I.C.C. had found HFL to be a common carrier under Part IV of the Interstate Commerce Act as to certain of its operations not under consideration here.[2] After the decision of the I.C.C. the Commission stated that HFL continued its operations by utilizing the underlying services of Matson Navigation Company (Matson).

Since it appeared to the Commission that HFL was holding itself out as an NVOCC, issuing through bills of lading in its own name, appearing on bills of lading issued by water carriers operating under the jurisdiction of the Commission as both shipper and consignee and not as agent, soliciting business as an NVOCC, etc., the Commission ordered HFL to show cause why it should not be found in violation of section 18(a) of the Shipping Act, 1916 (the Act), and section 2 of the Intercoastal Shipping Act, 1933, by charging higher rates than thos specified in its tariff. In addition to the foregoing, however, the Commission ordered an extensive examination into the operations of HFL from December 1, 1971, to establish whether HFL was an NVOCC subject to the cited provisions of law and to determine with particularly whether HFL had in fact violated these laws.

On October 23, 1974, the Commission ordered this proceeding to be enlarged to determine what if any sanctions should be applied to HFL.

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[2] *Star Forwarders, Inc. v. Hawaii Freight Lines, Inc.*, Docket No. FF-C-33, Decision and Order served, October 14, 1970 (unreported). In the cited case the I.C.C. had found that HFL had been operating as a "freight forwarder" under part IV of the Interstate Commerce Act (i.e., as a common carrier) as to certain of its operations in which it directly employed motor carriers certificated under Part II of the Act. Some time after that decision HFL discontinued this type of service and at least in the San Francisco area utilized the services of Matson Navigation Company under Matson's tariff on file with this Commission. Under the decision in *IML SeaTransit Ltd. v. United States*, 343 F. Supp. 32 (N.D. Calif. 1972), affirmed 409 U.S. 1002 (1972, rehearing denied, 409 U.S. 1118 (1973), HFL's utilization of an FMC-regulated service renders HFL an NVOCC subject to FMC jurisdiction. In the Los Angeles area, HFL did not restrict its operations to FMC-regulated tariff services and on occasion HFL itself did provide pickup service. Therefore some portion of HFL's Los Angeles services constituted those of a Part IV "freight forwarder," not an NVOCC. *IML Seatransit*, cited above, at p. 42. Although there is no evidence in the record as to HFL's operations at the Hawaiian end of its service, its tariff shows that HFL maintained a terminal there and on request furnished delivery service to consignees. According to the court in *Hawaiian Express Service, Inc. v. Pacific Hawaiian Terminals, Inc.*, 492 F. 2d 865, 867 (9th Cir. 1974), however, the use of motor carriers in Hawaii would not conver HFL from an NVOCC into a Part IV Freight Forwarder.

Because of HFL's failure to respond to an order of the Commission issued under section 21 of the Act on February 1, 1973.[3]

Shortly after the commencement of this proceeding, counsel for HFL advised that HFL terminated its operations and was preparing to liquidate the company. Counsel advised furthermore that HFL would cooperate to bring the proceeding to a conclusion.[4] In view of the circumstances, an evidentiary hearing was not necessary. Hearing Counsel introduced evidence into the record without objection and partially on the basis of a stipulation to certain facts. The evidence consists essentially of facts deemed admitted under Rule 12(h), 46 CFR 502.208(a), the stipulation, letters to HFL's shippers by Hearing Counsel with responses, statements of Commission field investigators, HFL freight bills and manifests, bills of lading issued by Matson, and tariff pages of HFL, Matson, United States Lines, and Seatrain Lines, California. See Motions to Admit Evidence and Close the Record Granted, June 30, 1975. This body of evidence supports the following findings of fact as proposed by Hearing Counsel. References are to the exhibits and tariff pages or items.

FINDINGS OF FACT

1. From June 27, 1968, when its tariff filed with the Federal Maritime Commission until early 1974, Hawaii Freight Lines was engaged in the business of arranging for the transportation of cargo by water from the U. S. West Coast to Hawaii (Ex. 1, Para. 1; Ex. 2 B through 2 I, Ans. 9 and 12).

2. During the above period of time, HFL would receive various shipments from shippers, consolidate such shipments into containers, arrange for the ocean transportation and ultimate delivery to the consignee in Hawaii (Ex. 1, Para. 2; Ex. 2 B. Ans. 9 and 12; Ex. 3).

3. During the above period of time, HFL solicited cargo in its own name by means of direct advertising and use of sales personnel (Ex. 1, Para. 3; Ex. 2 B through 2 I, Ans. 1 and 2).

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[3] HFL had been included as one of 51 NVOCC's which had filed tariffs with the Commission as to which the Commission was seeking information regarding current operations in Docket No. 73-56, *Non-Vessel Operating Common Carriers in the Domestic Offshore Trades*. Rather than cancel HFL's tariff in that proceeding for failure to respond, the Commission transferred disposition of this matter to the present proceeding. Docket No. 73-56, cited above, Order of Discontinuance, October 23, 1974.

[4] Although counsel for HFL has filed no objections in this proceeding, he also indicated puzzlement as to why the proceeding should continue. Despite my notice to the parties that a joint motion to discontinue seemed appropriate, no such motion was filed. See Cancellation of Prehearing Conference and Special Procedural Notice, May 10, 1974. Absent objection and considering the views of Hearing Counsel that continuance of the proceeding would serve a useful purpose, I granted Hearing Counsel's motion to admit evidence, close the record, and permit briefing. Despite HFL's financial predicament I am aware that its tariff has not yet been canceled. Theoretically if violations are found, shippers using HFL's services have a right to file complaints seeking reparation. Furthermore, the Commission has issued decisions in previous cases for precedential value despite the apparent mootness of the cases involved. See, e.g., *Rates, Hong Kong-United States Trade*, 11 F.M.C. 168, 173 (1967), *American Export Isbrandtsen Lines, Inc.*, 14 F.M.C. 82, 90 (1970). Therefore, despite HFL's demise, its previous denial of common carrier status and disclaimer of common carrier liability raise significant issues whose resolution should have precedential value with regard to other companies operating in a similar fashion.

4. During the above period of time, HFL accepted liability for loss or damage to cargo entrusted to it for transportation to Hawaii and in fact did pay claims presented by various shippers (Ex. 1, Para. 4; Ex. 2 B through 2 I, Ans. 6).

5. HFL made no oral representations to its shippers of its intention to disclaim liability for loss and/or damage to cargo (Ex. 1, Para. 5; Ex. 2 B through 2 I, Ans. 7).

6. HFL's still effective tariff on file with the FMC has continuously specified a rate from the U. S. West Coast to Hawaii of $.72 per cubic foot (Ex. 1, Para. 6; HFL Tariff FMC–F No. 1, Original Page 38).

7. During the above period of time, HFL charged shippers varying amounts ranging from $.72 to $.91 per cubic foot for transportation of FAK to Hawaii from the U. S. West Coast (Ex. 1, Para. 1; Ex. 2 B through 2 I, Ans. 10; Ex. 4, Para. 2).

8. During the above period of time, HFL selected the underlying carriers to be utilized for the water portion of the transportation to Hawaii and at no time did any shipper have a voice in that selection (Ex. 1, Para. 8; Ex. 2 B through 2 I, Ans. 14).

9. HFL's Tariff, FMC–F No. 1 contained a bill of lading provision which appears to disclaim HFL's liability for loss or damage to cargoes incurred during ocean transportation if the vessel utilized is not owned or demise chartered by HFL (HFL Tariff FMC–F No. 1, Provision 4, Item 200). However, as shown by the responses to a questionnaire contained in Ex. 2 B through 2 I, most of HFL's shippers were not aware of the existence of HFL's Tariff and they had not been informed that HFL was not liable for its shipments while they were not in HFL's possession (Ex. 2 B through 2 I, Ans. 6). In fact, HFL's shippers did consider HFL liable for its shipments (Ex. 2 B through 2 I, Ans. 6).

10. Starting in October, 1970, according to Mr. Kesley MacMeekin, the Manager of HFL's San Francisco Office, HFL would not arrange for the pick-up or delivery of shipments to HFL. Mr. MacMeekin advised the Commission's District Investigator, James A. Glugoski, that when he received an inquiry for a shipment to be consolidated, he advised the customer that HFL is only a consolidator and cannot legally arrange for the pick-up of the shipment. He informed the customer that the customer could arrange for trucking by any motor carrier or its could use Jim's Trucking Co. (Jim's) at whose terminal HFL is located. He would then give the customer the telephone number of Jim's Trucking Co. Jim's was HFL's San Francisco agent for stuffing containers (Ex. 3, Para. 2).

11. Mr. James Stewart, Operator of Jim's, advised District Investigator Glugoski that Jim's acted as HFL's agent only with respect to stuffing and loading containers, but not with respect to any pick-up and delivery

or hauling of full or empty containers to the carrier's container yard. He advised that when Mr. MacMeekin was away from the office, he or his employees would answer HFL's telephone (824-7049). He stated that Mr. MacMeekin had ordered him not to arrange for pick-up of cargo when speaking to shippers on HFL's telephone. His orders were to tell the caller that HFL could not pick up the shipments, but that the caller could provide his own trucker or telephone Jim's at another number on the same premises (863-1735). He advised that this was done to avoid being classified by the Interstate Commerce Commission as an unlicensed Part IV Interstate Commerce Commission Freight Forwarder. He advised that many times the caller would then call the number of Jim's and he or his employee would then arrange for pick-up service (Ex. 3, Para. 2).

12. Mr. Patrick Breslin, Terminal Manager, Shipper/Imperial Inc., and Shippers Encinal Express, Inc., confirmed with District Investigator James A. Glugoski that his company is an agent of Matson Navigation Company (Matson) and acts as its motor carrier of containers in the San Francisco Bay Area. He stated that he dispatched drivers to HFL at One Loomis Street, San Francisco, to pick-up full containers and leave empty containers. He stated that HFL and/or Jim's do not haul any full containers from HFL's terminal to Matson's container yard. He showed dispatch records and truck driver's logs to substantiate his statement that all trucking is performed by his company. He said that Jim's may have picked up a few empty containers from the container yard (Ex. 3, Para. 4).

13. HFL's manifests for the period from February, 1973 to April, 1974 show that except for one instance HFL utilized Matson as the underlying ocean carrier for all its shipments from San Francisco during this period (Ex. 4C, Pages 1 through 233).

14. HFL's shipments via Matson were carried pursuant to Matson's all-water tariff on file with the Federal Maritime Commission. This tariff provides for port zone pick-up and delivery service and the service is performed by a motor carrier acting as Matson's agent (Ex. 4, Para. 3; Ex. 4 B, Pages 1 through 52; original pages 26 through 31, first revised page 32, original page 33, and first revised page 146 of Matson Westbound Container Freight Tariff No. 14–B, FMC–F No. 146; original pages 29 through 36 and first revised page 186 of Matson Westbound Container Freight Tariff No. 14–C, FMC–F No. 150).

15. From Los Angeles, HFL also regularly utilized Seatrain Lines, California (Seatrain), and United States Lines, Inc. (U.S.L.) vessels (Ex. 4 D, Pages 1 through 242; Ex. 4, Para. 4). Seatrain's Container Freight Tariff did not provide pick-up service for FAK shipments at Los Angeles (Seatrain Lines, California Freight Tariff No. 1–A, FMC–F No. 4, original pages 22 and 46). U.S.L.'s Freight Tariff No. 1, FMC–F No. 53, provides for pick-up service for FAK shipments from both the San Francisco and

Los Angeles areas (Note 6, second revised page 20, original page 9, first revised page 10, original pages 11 through 18, first revised page 19, original page A–19, of U.S.L. Freight Tariff No. 1, FMC–F No. 53).

16. HFL's Tariff provided for delivery of cargo to HFL's terminal in Hawaii or, for an additional charge, delivery to consignee's premises if requested (HFL Tariff FMC–F No. 1, Items 300 and 330).

17. On February 1, 1973, the Commission issued an order pursuant to section 21 of the Shipping Act, 1916 (46 USC 820), requiring HFL to complete and return a questionnaire attached to the order (Ex. 2A, Para. 3).

18. HFL niether applied to the order nor responded to the questionnaire. The section 21 Order specifically warned the parties to which it was directed that a failure to furnish the information requested would result in the institution of a proceeding to determine whether their tariff should be cancelled as a result of their failure to respond (Ex. 2–A, Para. 5).

19. As a result of HFL's failure to answer the questionnaire or otherwise respond to the section 21 Order, an Order to Show Cause was issued by the Commission directed to HFL. However, HFL still failed to reply to the questionnaire or comply with the section 21 Order (Ex. 2–A, Para. 6).

20. HFL is no longer actively engaged in any business activity and does not intend to resume any activity in the future. The corporation is presently in the process of declaring bankruptcy pursuant to its being dissolved (Ex. 2, Para. 1). HFL has no objection to the cancellation of its tariff (Ex. 2, Para. 2).

Discussion and Conclusions

The three ultimate issues for decision in this proceeding are: (1) Do the operations of HFL shown on the record demonstrate that HFL's status was that of an NVOCC subject to the provisions of the Shipping Act, 1916 (the Act), and the Intercoastal Shipping Act, 1933 (the 1933 Act)? (2) If so, did HFL violate section 18(a) of the Act and section 2 of the 1933 Act by charging higher rates than those specified in its tariff filed with the Commission? (3) Should any sanctions be applied to HFL because of HFL's failure to respond to an order issued by the Commission pursuant to section 21 of the Act?

The difficulty of this case is not in deciding the latter two issues. The record demonstrates, as Hearing Counsel have shown, that HFL charged varying rates ranging from $.72 to $.91 per cubic foot while in business commencing on or about June 27, 1968, to early 1974 despite having a tariff on file with the Commission which specified an FAK (freight all kinds) rate of $.72 per cubic foot for transportation of goods from West

Coast ports to Hawaii. The refusal to respond to the section 21 Order is similarly a fact which is undisputed and the sanction to be applied is clear, i.e., cancellation of the tariff. *Non-Vessel Operating Common Carriers in the Domestic Offshore Trades*, Docket No. 73–56, Order to Show Cause, September 7, 1973.[5] The more difficult problem is to determine whether HFL's status under the law was that of an NVOCC despite contentions that it acted merely as shipper's agent and disclaimed liability for loss or damage incurred during ocean transportation if the vessel utilized was not owned or demise chartered by HFL. For the following reasons, I find that HFL did act as an NVOCC fully subject to the shipping acts cited above, rather than as shipper's agent, and that its disclaimer of liability had no effect as a matter of law on its status as a common carrier.

Although neither section 1 of the Act nor section 5 of the 1933 Act defines the term "common carrier,"[6] it has long been held that this term means the common carrier at common law. See *Tariff Filing Practices, Etc. of Containerships, Inc.*, 9 F.M.C. 56, 62 (1965), and numerous cases cited therein. There are several versions of the common-law definition, all essentially the same, such as the following:

> [one who] by a course of conduct holds himself out to accept goods from whomever offered to the extent of his ability to carry. *Tariff Filing Practices, Etc. of Containerships, Inc.*, cited above, at page 62.
>
> . . . one who undertakes for hire to transport the goods of those who may choose to employ him. *Agreement No. 7620*, 2 U.S.M.C. 749, 752 (1945).
>
> . . . one who undertakes for hire to transport the goods of those who may choose to employ him from place to place. He is, in general, bound to take the goods of all who offer, unless his complement for the trip is full, or the goods be of such a kind as to be liable to extraordinary danger, or such as he is unaccustomed to convey. *The Niagara v. Cordes*, 62 U.S. 7, 22 (1858).
>
> The essential characteristics of the common carrier at common law are that he holds himself out to the world as such; that he undertakes generally and for all persons indifferently to carry goods for hire. . . *Philip R. Consolo v. Grace Line, Inc.*, 4 F.M.B. 293, 300 (1953).

The determination of common-carrier status can be made by reference to a number of indicia, e.g., variety of cargo carried, number of shippers, type of solicitation, regularity of service, port coverage, responsibility toward the cargo, issuance of bills of lading, etc. *Tariff Filing Practices, etc. of Containerships, Inc.*, cited above, at p. 65. It is not necessary; however, that a carrier's operations encompass every one of these factors. As the Commission stated:

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[5] The Commission's regulations also require the cancellation of HFL's tariff because it has ceased operations. 46 CFR 531.18(g).

[6] Section 1 of the Act merely defines "common carrier by water in interstate commerce" as "a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State . . . and any other State. . . ." Section 5 of the 1933 Act merely refers to section 1 of the 1916 Act. Significantly, in the legislative history to the 1916 Act there is a discussion of the distinction between a common carrier and tramp vessel in which reference is made to the common-law definition of common carrier quoted in *The Niagara v. Cordes*, 62 U.S. 7, 22 (1858), quoted in the body of this decision below. Hearings on H.R. 14337 before the Committee on the Merchant Marine and Fisheries, House of Representatives, 64th Cong., 1st Sess., April 13, 1916, pp. 10–11, 194.

The absence of one or more of these factors does not render the carrier noncommon, and common carriers may partake of some or all of these enumerated characteristics in varying combinations. *Id.*, p. 65.

The fact that a carrier such as HFL does not itself own or operate transportation equipment does not destroy its common-carrier status. The Commission has for some time recognized the so-called NVOCC, a common carrier publishing a tariff and offering a transportation service to the shipping public who neither owns nor operates vessels or motor vehicles. *Bernard Ulmann Company, Inc. v. Porto Rican Express Company*, 3 F.M.B. 771, 775 (1952); *Determination of Common Carrier Status*, 6 F.M.B. 245, 251–52, 256–57 (1961); *Puget Sound Tug & Barge v. Foss Launch and Tug Co.*, 7 F.M.C. 43, 49 (1962); General Order 4, 46 CFR 510.21(d). For purposes of tariff filing and other laws and regulations, the Commission does not generally distinguish between the vessel-operating and nonvessel operating common carrier. *Filing of Through Routes and Joint Rates*, 11 SRR 574, 578 (1970); *Determination of Common Carrier Status*, cited above, at pp. 252, 256–57.[7]

This, of course, is not the first case before this Commission in which a respondent carrier has contended that it is not subject to regulation by the Commission on one ground or another, usually purporting to show that the carrier is not a common carrier. Sometimes the carrier contended that its service was conducted pursuant to special contracts with shippers, or that it did not solicit or advertise or publish sailing schedules, or that it assumed no common-carrier liabilities, or that its service was limited to a small portion of the general public, or that it was a non-profit business, etc. See *Tariff Filing Practices, Etc. of Containerships, Inc.*, cited above; *Investigation of Tariff Filing Practices*, 7 F.M.C. 305 (1962). The Commission has uniformly rejected these contentions in order that the beneficial and remedial purposes inherent in tariff-filing and other provisions of the laws it administers will not be circumvented. In this regard the Commission has stated:

"[C]ommon carrier," however, is not a rigid and unyielding dictionary definition, but a regulatory concept sufficiently flexible to accommodate itself to efforts to secure the benefits of common carrier status while remaining free to operate independent of common carriers' burdens. *Tariff Filing Practices, Etc. of Containerships, Inc.*, cited above, at p. 65.

* * *

One of the purposes of the Shipping and Intercoastal Acts was to remedy various discriminatory practices prevalent in the shipping industry concerning establishment and maintenance of rates and fares. The acts, however, limit the Commission's regulatory jurisdiction in this matter to "common carriers." In order to effectuate the remedies intended by the enactment of a regulatory statute such as these, it is necessary to allow flexible and liberal interpretation of the statute. In this respect the court in (case citation

[7] Similarly both the Interstate Commerce Commission and Civil Aeronautics Board have for years dealt with "express companies" and "forwarders" as common carriers. See discussion on this point in 2 U.S. Code Congressional Service, 81st Congr.-2d Sess., relating to enactment of an amendment to Part IV of the Interstate Commerce Act by Public Law 81–881, pp. 4222–23.

omitted) . . . stated: "In determining the true nature of the transportation, it is necessary to have in mind the purpose of the Act (the Interstate Commerce Act). . . . In addition, the court should have in mind the fact that this legislation is remedial and should be liberally interpreted to effect its evident purpose and that exemption from the operation of the act should be limited to effect the remedy intended. *Tariff Filing Practices, Etc. of Containerships, Inc.*, cited above, at p. 69.

HFL's contentions that it acted merely as a shipper's agent and assumed no liability for loss or damage while goods were in the custody of the underlying ocean vessel must be evaluated in the above context.[8] If one thing can be clearly established, it is that it is not a carrier's self-declarations that determine its status under the law but rather how it operates. In *Transportation-U.S. Pacific Coast and Hawaii*, 3 U.S.M.C. 190, 196 (1950), the Commission stated:

Nor is a holding out as a common carrier negatived, as Mills contends it is, by the fact that the printed terms and conditions of the common-carrier form of bill of lading which he used were crossed out and the shipments covered by separate contracts. *Common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest.* (Case citations omitted.) (Emphasis added.)

In *Investigation of Tariff Filing Practices*, cited above, the Commission stated:

If it means that [the carrier] has not sought or willingly assumed common carrier obligations; this, while true, is of no aid to [the carrier]. *Common carrier status and obligations are results of a carrier's operations, not its desires.* 7 F.M.C. at p. 321. (Emphasis added.)

Again, in *Tariff Filing Practices, Etc., of Containerships, Inc.*, cited above, the Commission stated:

In *Bernard Ulmann Co., Inc. v. Porto Rican Express Co.*, 3 F.M.B. 771, 775 (1952), the Commission aptly stated that *a carrier's status is determined by the nature of its service offered to the public and not upon its own declarations.* A close look at its activities is necessary. 9 F.M.C. at p. 64. (Emphasis added.)[9]

Finally, in *United States v. California*, 297 U.S. 175, 181 (1936), the Supreme Court stated:

. . . whether a transportation agency is a common carrier depends not upon its corporate character or declared purposes, but upon what it does.

See also *Terminal Taxicab Co. v. Dist. of Columbia*, 241 U.S. 252, 254 (1916); *United States v. Brooklyn Terminal*, 249 U.S. 296 (1919).

Similarly, the Interstate Commerce Commission determines the status of the carriers it regulates on the basis of those carriers' operations, not the carriers' self-descriptions or self-designations. See *Yankee Shippers Agent, Inc., Investigation*, 326 I.C.C. 328 (1966); *Barre Granite Assn., Inc. Freight Forwarder Application*, 265 I.C.C. 637, 639 (1949).

[8] HFL has filed no brief and is not presently making these contentions. However, according to the Order which initiated this proceeding, these contentions were made while HFL was actively engaged in business upon inquiry by the Commission's staff. As explained earlier, resolution of issues raised by such contentions will have precedential value in case other companies are operating in similar fashion.

[9] The statement in the *Bernard Ulmann Co.* case actually appears on pp. 776–77 as follows:

But we deem that respondent's status depends upon the nature of the service offered to the public and not upon its own declarations. (Citing *Bank of Kentucky v. Adams Express Co.*, 93 U.S. 174, 180 (1876).

It is readily apparent from a review of the record that HFL conducted itself as a common carrier and not as a shipper's agent. HFL solicited cargo in its own name by means of advertising and use of sales personnel and provided a transportation service for an indefinite multitude of shippers utilizing the underlying services of water carriers. After surrendering their cargo to HFL, furthermore, the shippers exercised no further control in the selection of these underlying carriers. Even though HFL's tariff contained a disclaimer of liability, furthermore, HFL made no oral disclaimer to shippers and in fact did pay claims presented by various shippers. It is evident that HFL was offering to the general public a coordinated transportation service, including consolidation at its terminals, transportation by water, and distribution to consignees in Hawaii, and that the shippers utilizing HFL's service had no authority to alter the service.[10] The contention that HFL acted merely as shipper's agent is therefore totally without substance. That such an operation is that of a common carrier has been recognized for many years in the most closely analogous situation in transportation, i.e., the freight forwarder regulated under Part IV of the Interstate Commerce Act, 49 U.S.C. 1001 et seq. In *Chicago Etc. R. Co. v. Acme Fast Freight,* 336 U.S. 465, 484, 485 (1949), the Supreme Court discussed the difference between the "forwarder" who merely booked or dispatched cargo and the "forwarder" who operated like HFL, i.e., engaged essentially to deliver less-than-carload lots safely at ultimate destination while employing underlying equipment-operating carriers in the fulfillment of this service. The former type was recognized as a mere shipper's agent but the latter was held to be a common carrier with common-carrier liability. The Interstate Commerce Commission has not hesitated in finding the latter-type operator to be a common carrier pursuant to section 402(a)(5) of the Freight Forwarder Act, 49 U.S.C. 1002(a)(5). See *Yankee Shippers Agent, Inc., Investigation,* cited above; *Barre Granite Assn. Inc., Freight Forwarder Application,* cited above; *Star Forwarders, Inc. et al. v. Hawaii Freight Lines, Inc. et al.,* cited above; *Universal Transcontinental Corp. F.F. Application,* 260 I.C.C. 521, 522–23 (1945).

HFL's contention that disclaimer of liability in its tariff or bill of lading signifies that its service was not that of common carriage is similarly without substance. The fact is that HFL did honor some claims and shippers were not aware of the disclaimer. But even if HFL had fully implemented the disclaimer provision in its tariff, this fact alone has no legal significance in determining HFL's carrier status. Several of the previous cases discussed also stand for the proposition that one holding himself out to perform a transportation service in the manner of HFL will have liability imposed upon him by law by virtue of such an occupation

[10] Indeed, HFL's tariff specifically states:

Carrier does not agree to transport shipments on any particular vessel nor in time for any particular market . . . HFL, Inc. Tariff FMC–F No. 1, Item 90.

and this Commission has shown itself alert to counteract "efforts to secure the benefits of common carrier status while remaining free to operate independent of common carriers' burdens." *Tariff Filing Practices, Etc. of Containerships, Inc.*, cited above, at p. 65.

In *Yankee Shippers Agent, Inc., Investigation*, cited above, the Interstate Commerce Commission stated:

> Regardless of its [Yankee's] avowed disclaimer of responsibility for the safe transportation of property under its control as a freight forwarder, its service is held out to and performed for the general public and damage claims are handled by Yankee. Therefore, it must be held to have assumed all the burdens incidental to the complete transportation service which it proffers. (Case citation omitted.) Disclaiming responsibility does not change this fundamental fact, nor permit Yankee to escape regulation. *Universal Transcontinental Corp., F.F. Application*, 260 I.C.C. 521, 522–523. 326 I.C.C. at pp. 333–34.

In *Hopke Freight Forwarder Application*, 285 I.C.C. 61, 64 (1951) the Interstate Commerce Commission similarly stated:

> In (case citation omitted) we found that if a service, in all other respects that of a freight forwarder, is held out to and performed for the general public, the person providing such service must be held to have assumed the burdens incident thereto, among which the responsibility to the shipper for the safe transportation of its property. As Hopke's service is held out to and performed for the general public, we find that he is responsible to shippers for the transportation of their property.

For similar holdings see also *R.T.C. Term. Corp. Freight Forwarder Application*, 265 I.C.C. 641, 643 (1949); *Universal Transcontinental Corp. F.F. Application*, cited above, 260 I.C.C. at p. 523; *Modern Intermodal Traf. Corp.-Investigation*, 344 I.C.C. 557, 570 (1973).

Similarly, in *Transportation-U.S. Pacific Coast and Hawaii*, cited above, this Commission found a carrier to be engaged in common carriage despite its attempts to expunge the terms and conditions of the common-carrier bill of lading in favor of special contracts. This fact did not nullify the finding that the carrier had in other respects demonstrated that he was holding himself out "to transport goods for such as choose to employ him." 3 U.S.M.C. at pp. 196, 197.

In *The City of Dunkirk*, 10 F. 2d 609 (S.D.N.Y. 1925), the Court found the carrier to be a common carrier with common-carrier liability for short delivery and damage on a shipment of cocoanut oil despite a special exculpatory provision in the bill of lading. The Court stated:

> I see no ground whatever for holding, on the evidence, that the vessel was other than a common carrier. . . . The City of Dunkirk was a general ship taking cargo at various points from various shippers and issuing bills of lading to the several shippers. . . . 10 F. 2d at p. 611.

As we have seen above, the Commission has stated that the absence of any particular factor usually associated with common carriage does not render a carrier noncommon. *Tariff Filing Practices, Etc. of Containerships, Inc.*, cited above, at p. 65. In *Berhard Ulmann Co. Inc. v. Porto Rican Express Co.*, cited above, the Commission quoted with approval a definition derived from a standard treatise on carriers which set forth five

characteristics which define the common carrier, not one of which was the assumption of liability for loss or damage. *Id.*, p. 776.[11]

The reason why assumption of liability need not be included in any definition of common carriage reduced to its essence, as can be seen from the previous cases discussed, is that once a person holds himself out generally to carry for hire for whomsoever wishes to employ him he has undertaken the occupation of a common carrier and liability will be imposed upon him as a matter of law. So strict is this doctrine that a common carrier's liability has been likened to that of an insurer. In *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397 (1889), the Supreme Court explained this ancient doctrine:

> By the settled law, in the absence of some valid agreement to the contrary, the owner of a general ship, carrying goods for hire, whether employed in internal, in coastal or in foreign commerce, is a common carrier, with all the liability of an insurer against all losses, except only such two irresistible causes as the act of God and public enemies. 129 U.S. at p. 437.
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> * * *
>
> The fundamental principle, upon which the law of common carriers was established, was to secure the utmost care and diligence in the performance of their duties. That end was effected in regard to goods, by charging the common carrier as an insurer, and in regard to passengers, by exacting the highest degree of carefulness and diligence. A carrier who stipulates not to be bound to the exercise of care and diligence seeks to put off the essential duties of his employment. *Id.*, at p. 440.[12]

The exact delineations of common-carrier liability and permissible limitations of liability may have undergone some refinement since the *Liverpool* case was decided but the principle that he who acts as a common carrier is subjected to liability by virtue of his occupation is still valid. In a modern case the Supreme Court reiterated the basic doctrine enunciated in *Liverpool* as follows:

> If, on the other hand, the shipment has been entrusted to a forwarder of the second type—i.e., one who contracted to deliver the goods to the consignees at rates set by itself—the forwarder was subjected to common carrier liability for loss or damage whether it or an underlying carrier had been at fault. The fact that the forwarder did not own the carriers whose services it utilized was held to be immaterial. *Its undertaking was to deliver the shipment safely at the destination. Common carrier liability was the penalty for failure of fulfilment of that undertaking. Chicago, etc. R. Co. v. Acme Fast Freight*, cited above, 336 U.S. at p. 485. (Emphasis added.)

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[11] The definition is contained in *Hutchinson on Carriers*, 3d Ed., vol. 1, sec. 48 as follows:

> (1) He must be engaged in the business of carrying goods for others as a public employment, and must hold himself out as ready to engage in the transportation of goods for persons generally as a business, and not as a casual occupation. (2) He must undertake to carry goods of the kind to which his business is confined. (3) He must undertake to carry by the methods by which his business is conducted and over his established road. (4) The transportation must be for hire. (5) An action must lie against him, if he refuses without sufficient reason to carry such goods for those who are willing to comply with his terms.

[12] In another early case the Court similarly emphasized:

> the common law subjects the common carrier to insurance of the goods carried. . . . And if by special agreement the carrier is exempted from . . . responsibilities it does not follow that the employment is changed . . . [W]hen a carrier has a regularly established business for carrying all or certain articles . . . it is a common carrier and a special contract about its responsibility does not divest it of the character.
>
> *Railroad Company v. Lockwood*, 84 U.S. 357, 376–77 (1873).

For the foregoing reasons, I find that HFL has operated as a non-vessel operating common carrier (NVOCC) between San Francisco and to some extent, Los Angeles, California, and Hawaii subject to the provisions of the Shipping and Intercoastal Shipping Acts. I find furthermore that HFL's operations fit the definition set forth by the Commission in *Determination of Common Carrier Status*, cited above, 6 F.M.B. at p. 256 (1961), where the Commission stated:

> We conclude that a person or business association may be classified as a common carrier by water who holds himself out by the establishment and maintenance of tariffs, by advertisement and solicitation, and otherwise, to provide transportation for hire by water in interstate or foreign commerce, as defined in the Shipping Act, 1916; assumes responsibility or has liability imposed by law for the safe transportation of the shipments; and arranges in his own name with underlying water carriers for the performance of such transportation, whether or not controlling the means by which such transportation is effected, is a common carrier by water as defined in the Shipping Act, 1916.[13]

ULTIMATE CONCLUSIONS

From on or about June 27, 1968, to early 1974, respondent HFL offered to the general public a coordinated transportation service between San Francisco and Los Angeles, California, and Hawaii employing the services of vessel-operating carriers pursuant to tariffs filed with this Commission. As such, HFL was operating as an NVOCC subject to the provisions of section 18(a) of the Shipping Act, 1916, and section 2 of the Intercoastal Shipping Act, 1933, and not merely as the agent of shippers.

HFL did accept liability for loss or damage to cargo and paid claims although a provision in its tariff disclaimed liability while goods were in the custody of ocean carriers. Even had HFL refused to accept liability, however, such a disclaimer is a legal nullity since the law imposes liability on one operating a common carrier service.

At various times during the above period of time HFL violated the cited provisions of law by charging rates higher than those specified in its tariff on file with the Commission.

Since HFL has refused to respond to an order of the Commission for information duly issued pursuant to section 21 of the Shipping Act, 1916,

[13] Unlike the Part IV Freight Forwarder regulated by the I.C.C., the NVOCC is not defined by the statute. Rather it is a concept that has grown in case law, first in the *Bernhard Ulmann Co., Inc.* case cited above, and later in *Determination of Common Carrier Status*, cited above. As discussed previously, generally there is no distinction between the NVOCC and the vessel-operating carrier for regulatory purposes. Again, as discussed previously, the Commission has held that common carrier definitions should not be rigid and unyielding and a carrier may be common even if some of the usual characteristics of common carriage are absent. *Tariff Filing Practices, Etc. of Containerships, Inc.*, cited above, at p. 65. I agree with Hearing Counsel that certain language in *Determination of Common Carrier Status*, cited above, is confusing since it seems to suggest that an NVOCC must either assume liability or have liability imposed "by the courts," although the Commission also stated that "the assumption or attempted assumption of liability should not be the sole test of common carrier by water status." *Id.*, p. 256. As discussed above, there is no need to wait for courts to impose liability on one who performs a service such as HFL's since liability has long since been imposed by the courts on one who offers this type of service.

and has furthermore ceased operations, its tariff should be and hereby is canceled.

(S) NORMAN D. KLINE,
Administrative Law Judge.

WASHINGTON, D.C.,
October 16, 1975.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 327(I)

KONWAL CO., INC.

v.

ORIENT OVERSEAS CONTAINER LINE

PARTIAL ADOPTION OF DECISION

November 12, 1975

BY THE COMMISSION: (Helen Delich Bentley, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett and James V. Day, *Commissioners*)

Konwal Co., Inc. (Konwal) filed its complaint before the Commission alleging improper charges by Orient Overseas Container Line (OOCL) and seeking reparation of the alleged improper charge. By consent of the parties the case was heard under Subpart S of the Commission's Rules of Practice and Procedure as an informal adjudication of a small claim.

Settlement Officer Juan E. Pine issued his decision awarding reparation. Thereafter, the Commission timely issued notice of its intention to review the proceeding.

FACTS

The claim here involved arose from the shipment by Konwal of eight cargoes on vessels of OOCL from Hong Kong to San Francisco, California. San Francisco was the specified port of discharge in each of the pertinent bills of lading. Notwithstanding the specifications of San Francisco as the port of discharge, each of the cargoes was, in fact, discharged at Oakland, California. OOCL then arranged, in each case, to have the cargoes transported by truck from Oakland to San Francisco and then to the point specified by the consignee. The charges for this truck transportation from Oakland to San Francisco were apparently paid by Konwal who now seeks repayment for those charges.

Konwal alleges that in so arranging truck transport, OOCL was acting

under Rule 28 of the applicable tariff.* Rule 28 which Konwal claims controls this situation, provides:

> If the carrier discharges cargo at a discharge port other than the port of discharge named in the bill of lading, the carrier may arrange, at its option, to move the shipment from actual port of discharge as follows: to the port of destination stated in the bill of lading, alternatively, the carrier may forward the cargo direct to a point designated by the consignee, provided, the consignee pays the cost which the consignee normally would have incurred to move the cargo to such point had the cargo been discharged at the port of destination stated on the bill of lading.

Konwal alleges that under this rule, if the carrier elects to arrange transportation from the actual port of discharge to the port of discharge specified in the bill of lading, the shipper/consignee is responsible for payment only of drayage charges within San Francisco—i.e., trucking charges for transportation of cargo from the port of San Francisco to a point specified by the consignee.

OOCL denied Konwal's claim on the basis that it had been their policy (which allegedly had been made clear to all consignees) that "equalization is not payable inasmuch as San Francisco, Oakland and/or Alameda are Bay Port areas." Therefore, implicitly, OOCL claims that tariff Rule 28 is not applicable and the consignee is responsible for the payment of any trucking charges involved. OOCL apparently equates the trucking charges from Oakland to San Francisco with drayage rates within San Francisco itself.

In his decision, Settlement Officer Pine did not specifically discuss the defense raised by OOCL. Rather, he awarded reparation on the basis of Rule 28 itself. Mr. Pine found Rule 28 to be discretionary and an ambiguous tariff provision. Settlement Officer Pine found that Rule 28 as a discretionary rule could not be relied upon by a carrier to defeat a claim raised under it citing our decisions in *Abbott Laboratories v. Alcoa Steamship Co.* (Informal Docket No. 321(I) served April 8, 1975) and *P.P.G. Industries, Inc. v. Royal Netherlands Steamship Co.* (Informal Docket No. 290(I) served April 8, 1975). Mr. Pine also found Rule 28 to be inherently ambiguous which therefore must be construed against the carrier who prepared the rule, citing *U.S. v. Hellenic Lines, Ltd.* (14 F.M.C. 255 (1971)). Attempted use of Rule 28 by OOCL was concluded to be in violation of section 18(b)(3) of the Shipping Act, 1916, as allowing OOCL to receive a greater compensation for the transportation of property than that specified in the tariff and thereafter failing to remit any portion of the overcharge. So concluding Settlement Officer Pine awarded reparation.

Discussion and Conclusions

We have reviewed this proceeding and concur in the award of reparation granted by Settlement Officer Pine. However, we do not agree

*Hong Kong Eastbound Pacific Coast Tariff No. 1 (FMC–1).

that determination of this claim should be founded on the reasoning adopted by Mr. Pine regarding the discretionary nature of Rule 28 and the ambiguity he found in the rule.

Notwithstanding the claimed "policy" of OOCL that Oakland and San Francisco are the same port for equalization purposes, we consider these to be two separate ports to which the provisions of Rule 28 apply. In the case of each cargo, OOCL discharged it at Oakland. The port of discharge specified in the bill of lading was San Francisco. It is clear therefore that OOCL had discharged its cargo at a discharge port other than that specified in the bill of lading. The carrier, then, had only two lawful options. Both of these options were provided by Rule 28. Under its terms the carrier could:

(1) move the cargo "to the port of discharge specified in the bill of lading"; or

(2) "forward the cargo direct to a point designated by the consignee. . . ."

From the record, the carrier apparently availed itself of both options with respect to the various shipments. It is our conclusion that having elected to act under Rule 28, the carrier became bound by the provisions thereof. The rule states, without ambiguity and without any discretion vested in the carrier, that the carrier may arrange ground transportation as he did here *provided* the consignee pays the cost of drayage from the port of discharge specified in the bill of lading to the point designated by the consignee. In short, once the carrier has elected to arrange ground transportation when it discharges cargo at a port other than that specified in the bill of lading, the consignee pays only the amount which it would have cost him to arrange transportation from the proper port to a point of destination.

We find no discretionary quality in the rule with regard to the collection of trucking charges. That collection is all that is at issue here. We take no position as to the discretion vested in the carrier regarding whether or not he decides to arrange transportation at all. That issue does not here arise. Further, we think this Rule 28 to be clear as to who bears the responsibility for ground transportation charges. We hold that the carrier is responsible for the cost of transportation from the actual port of discharge to the port of discharge specified in the bill of lading under the clear terms of its own tariff. We, therefore, concur in the award of reparation in the amount of $363.87 granted by Settlement Officer Pine and adopt his decision to that extent.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 327(I)

KONWAL CO., INC.

v.

ORIENT OVERSEAS CONTAINER LINE

Reparation awarded.

Decision of Juan E. Pine, Settlement Officer[1]

Konwal Co., Inc. (KONWAL) claims $380.37 as reparation from Orient Overseas Container Line (OOCL) for equalization with respect to eight different shipments of such varied commodities as plastic toys, plastic containers, rattan sticks, plastic flowers, mirrors and plastic dolls, transported from National Mercantile, Hong Kong to KONWAL, the bills of ladings for which indicate that San Francisco, California is the port of discharge. The truck movements (U.E.P. Transports) from OOCL's port of delivery at Oakland to the consignee at San Francisco took place on April 6, April 26, July 20, August 16, October 2, October 19, November 5, and November 28, 1973. The claims were filed with the Commission on February 26, 1975, within two years from the date the cause of action arose and must be considered on their merits as ruled by the Commission in *Colgate Palmolive Company* v. *United Fruit Company*, Informal Docket No. 115(I), served September 30, 1970.

The equalization claims are based on the excess of the trucking rates from Oakland to San Francisco,[2] (paid by KONWAL) over the drayage rates within San Francisco. The rates are published in California Public Utility Commission Tariffs Nos. 2 and 19, respectively.

OOCL's Hong Kong Eastbound Pacific Coast Tariff No. 1 (FMC–1) contains rates from Honk Kong to United States Pacific Coast Ports, however, no ports are specifically named therein.

KONWAL's claim is based on Rule 28 of OOCL's tariff which provides:

[1] Both parties having consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2] KONWAL has submitted freight bills covering the truck movement of the subject shipments from OOCL in Oakland to KONWAL in San Francisco.

"If the carrier discharges cargo at a discharge port other than the port of discharge named in the bill of lading, the carrier *may* arrange, at its option, to move the shipment from actual port of discharge as follows:

"To the port of destination stated in the bill of lading, alternatively the carrier *may* forward the cargo direct to a point designated by the consignee, provided, the consignee pays the costs which the consignee normally would have incurred to move the cargo to such point had the cargo been discharged at the port of destination stated on the bill of lading." (Underscoring provided.)

The above is a discretionary rule. In Informal Docket No. 321(I) served April 8, 1975—*Abott Laboratories* v. *Alcoa Steamship Company,* the Commission indicated that it believed that the discretionary nature of a tariff provision (Rule 11) being considered therein rendered it unenforceable. Rule 11 provided:

"Claims by shippers for adjustment of freight charges will be considered only when submitted in writing to the carrier within six months of date of shipment. Adjustment of freight based on alleged error in description *may* be declined unless application is submitted in writing sufficiently in advance to permit verification of description, before the cargo leaves the carrier's possession." (Underscoring provided.)

The Commission also stated that in its order on remand in Informal Docket No. 290(I) served May 16, 1974—*P.P.G. Industries, Inc.* v. *Royal Netherlands Steamship Co.,* "we discussed at length the use of the word 'may' in a rule similar to that relied upon by Alcoa [Rule 11 above] and stated that such a discretionary rule was in effect '. . . no rule at all.' " The Commission further stated that it would not in the future, permit carrier reliance upon rules which allow for discretion in a carrier's consideration or denial of claims; that such rules will not in and of themselves be permitted to defeat a claim for overcharges. This logic follows the strict tariff adherence mandate set by the Commission in *Kraft Foods* v. *Moore McCormack Lines, Inc.,* in Docket No. 73–44 served March 26, 1974.

Rule 28 of OOCL's tariff is also ambiguous. Where a tariff is ambiguous or doubtful, it should be construed against the carrier who prepared it.[3]

Subsequent to a letter of August 22, 1974 from the Commission's staff that the above equalization rule was not specific, OOCL filed 16th Revised Page 35 to the subject tariff, with a published effective date of October 1, 1974, which amended Rule 28 by substituting the language "shall arrange at its expense" for "may arrange, at its option." By so modifying the rule, OOCL has now clarified that it shall equalize under the conditions as cited in revised Rule 28.

San Francisco is indicated as the port of discharge on all of the subject OOCL bills of lading. Had OOCL discharged the cargo at San Francisco, KONWAL would have had to pay only the drayage rate from point of rest on the dock to its place of business in San Francisco. As indicated above, if KONWAL's claims are settled as filed, KONWAL will be

[3] *United States of America* v. *Hellenic Lines, Limited,* 14 F.M.C. 260 (1971). See also *Peter Bratti Associates, Inc.* v. *Prudential Lines, Ltd.,* 8 F.M.C. 375 (1964).

paying only the drayage rate from point of rest on the dock to its place of business in San Francisco.

OOCL indicates in its tariff that it serves United States Pacific Coast Ports. The subject eight shipments were accepted by OOCL with San Francisco indicated as the port of discharge on the covering bills of lading, as requested by the shipper National Mercantile, during a six-month period. Hong Kong Export Lines, Ltd., agent for OOCL, prepared and issued the bills of lading.

As OOCL's agent accepted the subject bills of lading showing San Francisco as the port of discharge, and OOCL holds out in its tariff to serve United States Pacific Coast ports, it can not utilize the then discretionary equalization rule to discharge at another port, accepting no responsibility for the added transportation costs incurred by the receiver.

Based on the foregoing, below are the computations in KONWAL's claim for equalization reparation by OOCL.

Claim	*Local Freight Bill Date*	*Equalization*	*Weight*	*Rate*	*Transportation Charges*	
K–01	4–24–73	Oakland to S.F.	13,153#	$1.03	$135.48	
				surcharge	3.40	
					$138.88	
		S.F. to S.F.	13,153#	$ .67	88.13	
		Equalization				$50.75
K–02	5– 4–73	Oakland to S.F.	7,544 as 10,000#	$1.03	$103.00	
				surcharge	3.40	
					$160.40	
		S.F. to S.F.	7,544#	$ .67	50.54	
		Equalization				$55.86
K–03	7–20–73	Oakland to S.F.	3,702 as 5,000#	$1.43	$ 71.50	
				surcharge	3.40	
					$ 74.90	
		S.F. to S.F.	3,702 as 4,000#	$ .77	30.80	
		Equalization				$44.10
K–04	8–23–73	Oakland to S.F.	2,830 as 5,000#	$1.20	$ 60.00	
				surcharge	2.50	
					$ 62.50	
		S.F. to S.F.	2,830#	$ .82	23.21	
		Equalization				$39.29
K–05	10– 9–73	Oakland to S.F.	1,787#	$3.11	$ 55.58	
				surcharge	1.50	
					$ 57.08	

		S.F. to S.F.	1,787 as 2,000#	$ .79	15.80	
		Equalization				$41.28
		One container freight equalization $16.50[4]				
K–06	11– 6–73	Oakland to S.F.	1,933# as 5,000#	$1.50 surcharge	$ 75.00 1.50	
					$ 76.50	
		S.F. to S.F.	1,993# as 2,000#	$1.03	20.60	
		Equalization				$55.90
K–07	11–28–73	Oakland to S.F.	1,075#	$3.90 surcharge	$ 42.89 1.50	
					$ 44.39	
		S.F. to S.F.	1,075#		$ 44.39	
		Equalization			18.03	
						$26.36
K–08	10–19–73	Oakland to S.F.	2,638# as 5,000#	$1.50 surcharge	$ 75.00 2.50	
					$ 77.50	
		S.F. to S.F.	2,638#	$1.03	27.17	
		Equalization				$50.33

From the foregoing, OOCL is in violation of Section 18(b)(3) of the Shipping Act, 1916, for receiving a different compensation for the transportation of property or any service in connection therewith than the rates and charges specified in its tariffs, by its failure to remit in any manner any portion of the rates or charges so specified, in accordance with its tariff. Therefore, KONWAL is awarded reparations of $363.87 with interest at the rate of six percent per annum if not paid within 30 days of the date hereof. Reparation is denied with respect to the alleged $16.50 allowance to cover the one container load movement as provision for same is not made in OOCL's tariff, and any reparation thereon would result in the violation of Section 18(b)(3) of the Shipping Act, 1916.

(S) JUAN E. PINE,
Settlement Officer.

[4] Allegedly the policy of OOCL with respect to full container loads being delivered to San Francisco is to give $16.50 allowance per container to the consignee to cover the approximate cost of returning the empty container to OOCL's terminal in Oakland. Reparation of $16.50 is denied as the tariff contains no such allowance and payment of such allowance would violate Section 18(b) of the Shipping Act, 1916. KONWAL has agreed to cancel the $16.50 claim.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 472

COMMODITY CREDIT CORPORATION

v.

SURINAM NAVIGATION COMPANY, LTD.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

December 9, 1975

Notice is hereby given that the Commission on December 9, 1975, determined to adopt the initial decision in this proceeding subject to the following clarifications.

Whereas the initial decision broadly states that "there was an error due to inadvertence in failing to file the new rates, therefore waiver of collection of a portion of the freight may be allowed", it is silent on whether all other statutory requirements prerequisite to the grant of a waiver had been met.

Section 18(b)(3) of the Shipping Act, 1916 (the Act), empowers the Commission in certain circumstances, in its discretion and for good cause to permit a carrier by water in foreign commerce to refund a portion or waive collection of a portion of freight charges *provided:*

> That the common carrier . . . has prior to applying for authority to make a refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. *Provided further.* That the carrier . . . agree that if permission is granted by the . . . Commission, an appropriate notice will be published in the tariff, or such other steps taken as the . . . Commission may require, which gives notice of the rate on which said refund or waiver would be based, and additional refunds or waivers as appropriate shall be made with respect to other shipments. . . . *And provided further.* That application for refund or waiver must be filed with the Commission within one hundred eighty days from the date of shipment.

These provisions are not of a discretionary procedural nature. In order for the Commission to be vested with the authority to grant refunds or waivers it must first ascertain that all the requirements set forth in section 18(b)(3) of the Act have been complied with.

The record here shows that the on-board bill of lading covering the shipment of soybean salad oil is dated January 8, 1975; that the on-board

bill of lading covering the shipment of corn meal is dated January 9, 1975; and that the application was filed on May 19, 1975, within 180 days of the dates of shipment. Prior to applying for a waiver, the applicant filed, on April 2, 1975, a new tariff setting forth the rates sought to be applied and also affirmed that it would charge the same rate to Churchworld Service, whose shipment of salad oil moved at the same time and on the same vessel as Commodity Credit Corporation's cargo.

Therefore, notwithstanding the lack of specific findings to that effect in the initial decision, we are satisfied that applicant has complied with the statutory requirements of section 18(b)(3) of the Act and for that reason adopt the initial decision.

It is Ordered, That applicant is authorized to waive collection of $860.55 of the charges previously assessed Commodity Credit Corporation for shipments described in Special Docket No. 472.

It is Further Ordered, That applicant shall publish promptly in its appropriate tariff the following notice:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 472, that effective January 8, 1975, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from January 8, 1975 through April 2, 1975, from the Tampa, Florida/ Brownsville, Texas range to Haiti, the rate on "Soybean salad oil" is $63.50 W and on "Corn meal" $41.50 W subject to all applicable rules, regulations, terms and conditions of said rates and this tariff.

It is Further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver or refund made pursuant to this Order, including, but not limited to, the waiver or refund to Churchworld Service.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 472

COMMODITY CREDIT CORPORATION

v.

SURINAM NAVIGATION COMPANY, LTD.

Waiver of collection of a portion of charges permitted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

By application filed May 19, 1975, Surinam Navigation Company Ltd. (Surinam) has applied for permission to waive collection of a portion of the freight on a double shipment from New Orleans to Port-Au-Prince, Haiti, carried on respondent's vessel *M. V. Suriname*, under bill of lading dated January 9, 1975. The shipment consisted of 1,509,447 pounds (754.7235 short tons) of corn meal, and 141,094 pounds (70.5470 short tons) of soybean salad oil. Both shipments were booked October 24, 1974, for lifting December 15–18, 1974. At the time of the booking negotiation, the carrier advised Commodity Credit Corporation (CCC), that it intended to file a general rate increase effective December 9, 1974. On the basis of this advice, CCC and Surinam negotiated rates of $41.50 per short ton for corn meal and $63.50 per short ton for soybean salad oil; both rates to be all inclusive. On November 6, 1974, Surinam filed a general rate increase of about 12% to be effective December 9, 1974. Surinam failed to file the negotiated rates, and also failed to file the negotiated rates in the new tariffs effective December 9, 1974. Accordingly the corn meal was rated on the basis of $42.50 per short ton and the soybean salad oil was rated on the basis of $65.00 per short ton. The freight for the corn meal was $32,075.75. The freight for the soybean salad oil was $4,585.56. The freight actually collected for the corn meal was $31,321.03. The freight actually collected for the soybean oil was $4,479.73. Permission is sought to waive collection of $754.72 in the case of the corn meal and $105.83 in the case of the soybean salad oil, for a total of $860.55.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by

[1] This decision became the decision of the Commission December 9, 1975.

Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[2] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[3] states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

Applied to the facts it is found that there was an error due to inadvertence in failing to file the new rates. Therefore waiver of collection of a portion of the freight may be allowed. Accordingly, respondent Surinam Navigation Company, Ltd., is hereby allowed to waive collection of $860.55, which represents the total of the overcharge. A notice of waiver shall be published in Surinam's tariff.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
November 12, 1975.

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[2] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

[3] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges* under *Purpose of the Bill.*

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-35

AGREEMENT NOS. T-1685 AS AMENDED AND T-1685-6: BETWEEN THE CITY OF ANCHORAGE AND SEA-LAND SERVICE, INC.; AND AGREEMENT NO. T-3130: BETWEEN THE CITY OF ANCHORAGE AND TOTEM OCEAN TRAILER EXPRESS, INC.

Agreement No. T-1685, as amended through T-1685-5 is disapproved effective February 5, 1976 unless the parties to that Agreement, prior to that date, file with the Federal Maritime Commission an amendment to Article 1(a) as prescribed herein.

Upon submission of the required amendment, the remaining provisions of Agreement No. T-1685 will continue as presently approved.

Peter J. Nickles and *John Michael Clear* for the City of Anchorage, respondent.

Gerald A. Malia and *Edward A. McDermott, Jr.*, for Sea-Land Service, Inc., respondent.

Stanley O. Sher and *David C. Shonka* for Totem Ocean Trailer Express, Inc., respondent.

James E. Wesner for Tesoro-Alaskan Petroleum Company, protestant.

Alan F. Wohlstetter and *Edward A. Ryan* for Coastal Barge Lines, Inc., protestant.

Donald J. Brunner and Joseph B. Slunt, Hearing Counsel.

INTERIM REPORT[1]

January 30, 1976

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett, Bob Casey, James V. Day, *Commissioners*)

By Order of Investigation and Hearing dated September 15, 1975, the Commission instituted this proceeding to determine; (1) whether Terminal Agreement No. T-3130, between Totem Ocean Trailer Express, Inc. (Totem) and the City of Anchorage, Alaska (Anchorage), and Terminal Agreement Nos. T-1685 and T-1685-6, between Sea-Land Service, Inc. (Sea-Land) and Anchorage, are unjustly discriminatory or unfair as

[1] In view of the urgent need for Commission action on this matter prior to February 1, 1976 an Order was issued on January 30, 1976. This Report explains the basis for the Order which is attached and made a part hereof.

between carriers, shippers, exporters or importers, or operate to the detriment of the commerce of the United States, or are contrary to the public interest, or are otherwise in violation of the Shipping Act, 1916; (2) whether said agreements should be approved, disapproved or modified pursuant to section 15; and (3) whether section 15 has been violated by Totem and/or Anchorage by the construction of facilities provided for in Agreement No. T–3130 prior to the approval of said agreement by the Commission.

The Commission's Order of Investigation named Anchorage, Sea-Land and Totem as Respondents. Standard Oil Company of California, Western Operations Inc. (Standard); Coastal Barge Lines Inc. (Coastal); Puget Sound Tug and Barge Co. (Puget); Tesoro-Alaskan Petroleum Corporation (Tesoro); and Shell Oil Company (Shell) were made Petitioners in the proceeding.[2] Hearing Counsel also participated in the proceeding.

An evidentiary hearing was held in Washington in early December, 1975. These hearings consumed 11 days and produced 117 documentary exhibits and a transcript running to 1770 pages.

During the course of the hearings a problem arose which ultimately resulted in the Interim Initial Decision now before us on exceptions. Briefly stated, Sea-Land's present agreement with Anchorage (Agreement No. T–1685, as amended) grants it preferential berthing rights for its vessels at Terminal 1 commencing February 1, 1976. When a Sea-Land vessel is berthed at Terminal 1, Totem's vessel, the *Great Land,* will be precluded from berthing at the same facility and will instead be required to berth at Terminals 2 and 3 which provide the only alternative berthing location.[3] Totem claimed during the hearing that its vessel could not be safely berthed at Terminals 2 and 3 during severe winter icing conditions and that for that reason it would not call at Anchorage until improved weather conditions made it possible to utilize the alternative location without risk. This concern for the safety of Totem's vessel at Terminals 2 and 3 prompted the need for expeditious action and the interim proceeding which followed.

Thus, despite the expeditious manner in which the hearings were pursued, it became evident that in view of necessary briefing requirements, it would not be possible for the matter to be submitted to the Commission in time for it to render a decision on all the issues by February 1, 1976. It was determined therefore, that an interim decision of the Commission on or before February 1, 1976 might be possible whereby all of the rights of the parties might be preserved, service at Anchorage not jeopardized, and the public interest served, until such time as the

[2] Standard Oil subsequently withdrew its protest and was dismissed from the proceeding. Shell Oil did not actively participate in the hearing.

[3] Sea-Land has been offering common carrier service to the Port of Anchorage since 1964. Currently, the carrier has four vessels in regular service in the Anchorage trade.

Totem inaugurated service between Seattle and Anchorage in September, 1975. The carrier currently operates a single roll-on/roll-off vessel in direct competition with Sea-Land. All service to the Port is presently on a first-come-first-served basis.

Commission rendered a final decision. To this end, the Administrative Law Judge requested that the parties file proposed findings and conclusions addressed to the issue of whether temporary or conditional approval should be given to Agreement No. T–1685–6 granting Sea-Land preferential berthing rights at Terminal 2 for a sufficient period of time to enable the Commission to further consider whether such approval should be continued, modified or withdrawn.

Since Agreement T–1685–6 provides for a shift of Sea-Land's berth from Terminal 1 to Terminal 2 it was felt that the proposal for temporary conditional approval of T–1685–6 would make it possible to berth Totem's vessel at Terminal 1 until such time as the Commission decides the major issues raised herein.

In his Interim Initial Decision served December 29, 1975, Administrative Law Judge Stanley M. Levy concluded that:

(1) Temporary approval of T–1685–6 for 90 days is in the public interest and would serve a serious transportation need;

(2) Approval is on condition that during cement off-loading operations, Sea-Land will berth in a manner not to interfere with such operations; and

(3) If Sea-Land does not accept the temporary and conditional approval of preferential berthing rights at Terminal 2, previously approved preferential berthing rights for Sea-Land at Terminal 1 are rescinded.

Exceptions to this Interim Initial Decision were filed by Sea-Land and Tesoro. Replies to Exceptions were submitted by Anchorage, Hearing Counsel and Totem. Requests for oral argument were denied.

AGREEMENTS AND FACILITIES

Agreement No. T–1685–5 is the current agreement under which Sea-Land serves Anchorage. The agreement provides for Sea-Land enjoying preferential berthing rights at Terminal 1 for 104 calls per agreement year (February 1-January 31).

At the present time, Sea-Land is calling at the Port under the same conditions as Totem; i.e. on a first-come-first-served basis, Sea-Land having allegedly utilized its 104 preference calls for the agreement year 1975. However, effective February 1, 1976, Sea-Land will resume its preference at Terminal 1 and at its current rate of 3 calls per week will effectively utilize Terminal 1 most of the time.

Agreement No. T–1685–6, placed at issue in this proceeding, would shift Sea-Land's preferential berthing rights to Terminal 2. Sea-Land's preferential calls would also be increased from 104 to 156 calls per year. According to Sea-Land, Terminal 2 affords certain advantages over Terminal 1 due to its wider apron, improved traffic pattern, and the near proximity of its supervisory office. Sea-Land believes that it can achieve substantial cost reductions by operating at Terminal 2, in contrast to Terminal 1. In order to achieve these cost reductions, however, Sea-Land

is of the view that certain modifications should be made to Agreement No. T–1685–6. These modifications are before Judge Levy in the proceeding.

Agreement No. T–3130 between Totem and Anchorage would, *inter alia*, grant Totem preferential berthing rights at Terminal 1 and the petroleum terminal for 52 calls per year.

The reasoning behind these various relocations at the port, lies in the physical layout of the facilities at Anchorage. Anchorage's port facilities consist of a single linear pier approximately 2200 feet in length divided into 3½ cargo terminals. The petroleum facility at the southern end of the pier, and Terminal 1 adjoining it, both have petroleum headers to accommodate carriers transporting oil products. Terminal 1 is 600 feet long; Terminal 2 is 610 feet long and only one half of Terminal 3 is completed. Terminal 3's current length is 366 feet.[4] At Terminal 1, the width of the apron is 47 feet. At Terminal 2 the width is 69 feet.

Totem's vessel, the *Great Land*, has an overall length of 790 feet. Because of its length, the *Great Land* cannot berth at either Terminal 1 or Terminal 2, without some overlap onto the adjoining facilities. Agreement No. T–3130 will allow the *Great Land* to berth at Terminal 1 and extend onto the petroleum terminal (POL terminal) without any infringement of Terminal 2. Because of the design and length of the *Great Land*, unique problems are presented in mooring the vessel at Terminals 2 and 3. The great length of the vessel requires that it be moored with its stern flush with the end of Terminal 3. This results in a 90° angle of the mooring lines between the vessel and the dock which increases the tension on the line. Normal berthing practice would be to use a line to a mooring dolphin, or similar device, approximately 140° northward. However, at this time this does not appear to be possible at Anchorage.

Prior to the filing of Agreement No. T–3130, and in anticipation of service to Anchorage, Totem constructed with the Port's approval, permanent trestles at the POL-Terminal 1 site which would enable the *Great Land* to utilize three off-loading ramps at that facility. Because of limited facilities at Terminal 2 only one ramp can be utilized to off-load the *Great Land*.

INTERIM PROCEEDING

1. Position Of The Parties Before The Administrative Law Judge

In the proceedings before the Administrative Law Judge, all the parties with the exception of Sea-Land, favored some form of temporary approval of Agreement No. T–1685–6.

Totem, and the other parties filing briefs, focused primarily on the issue of whether it would be safe for the *Great Land* to berth at Terminals 2 and 3 during periods of severe icing. Totem explained that the mooring

[4] Terminal 3 is presently in the process of being lengthened an additional 325 feet 8 inches, with completion scheduled for October 1976.

problems are magnified during the winter months when ice conditions prevail, because the ice exerts great pressure on the flat stern of the vessel especially during ebb tides. As a result, Totem pointed out that there is the possibility that the ice and winter winds could cause the *Great Land* to become unmoored with the resultant risk of catastrophic damage. In view of this potential danger, Totem has advised that it would not utilize Terminals 2 and 3 during severe icing conditions.

Sea-Land on the other hand saw no "crisis" during the severe winter months which would preclude Totem from utilizing Terminals 2 and 3 and was of the opinion that Totem's mooring problems with the *Great Land* could be resolved without significant modification to the vessel. Also, Sea-Land opposed any temporary approval of Agreement No. T–1685–6, until the Commission resolves all of the issues raised by that agreement. According to Sea-Land, Anchorage has, since the commencement of this proceeding, announced new interpretations of language appearing in both the existing preferential agreement and the proposed amendment thereto which conflict with the historical interpretation by the parties and therefore create ambiguities in these agreements and the consequent need for clarification.

If certain modifications and clarifications are made in the agreement, as requested by Sea-Land, it would go along with conditional approval of Agreement No. T–1685–6. Sea-Land's counter-proposals, eight in number, are elaborate and involve a far-reaching amendment to Agreement No. T–1685–6 as now submitted.

The City of Anchorage, Hearing Counsel, and Tesoro all generally supported temporary approval of Agreement T–1685–6. All three parties also recommended that, if Sea-Land refused to go along with conditional approval at this time, the Commission should suspend Sea-Land's preferential berthing rights under T–1685–5.

2. Interim Initial Decision

Administrative Law Judge Levy concluded that temporary approval of Agreement T–1685–6 for 90 days is in the public interest and would serve a serious transportation need. *F.M.C. v. Svenska Amerika Line*, 390 U.S. 238 (1968). In this regard he found that continuing Sea-Land's preferential berthing rights at Terminal 1, subsequent to February 1, 1976, would effectively preclude Totem from operating at Terminal 1, and that requiring Totem to utilize Terminals 2 and 3 would result in severe economic disadvantages to Totem in view of the great reduction in off-loading efficiency at the latter facility.

Judge Levy found conflicting evidence on the issue of whether Totem's vessel could safely be berthed at Terminals 2 and 3 during heavy icing periods. However, Judge Levy found it unnecessary to resolve this issue in his decision, explaining that "whether the vessel is in danger by ice need not be determined since other considerations of public interest

warrant a result which do not preclude berthing of the *Great Land* at POL—Terminal 1."

The "other considerations" cited were the reduction in off-loading efficiency at Terminal 2. Thus, he found that:

> Absent other overriding considerations, the requiring of less efficient operations when more efficient operations are possible, must result in poor service and would not be in the public interest.

Judge Levy considered Sea-Land's elaborate counter-proposals as "irrelevant to the present interim decision requirements," explaining that the issues raised by the counter-proposals could properly be considered by the Commission in its final resolution of the proceeding, and consideration of whether to grant temporary approval of Agreement T–1685–6, as submitted, would not ultimately, materially, or substantially, affect the rights of any party, including Sea-Land.

In order to accommodate Coastal's[5] bulk cement barge unloading operations at Terminal 2, Judge Levy conditioned approval on Sea-Land's agreeing that, during such time as bulk cement off-loading operations require barge utilization of facilities at Terminal 2, it would not interfere with such cement operations.

Finally, Judge Levy held that in the event that Sea-Land should refuse to accept such temporary and conditional approval of Agreement No. T–1685–6, approval of Agreement No. T–1685, as amended, would be rescinded.

3. Exceptions and Replies

Sea-Land filed lengthy exceptions to the Interim Initial Decision of Judge Levy. However, it did advise that it would, if the Commission so ordered, accept the 90-day approval of its Agreement No. T–1685–6, with the understanding that certain modifications to that Agreement were "imperative".

Briefly stated, Sea-Land excepts to the initial decision on the grounds that: (1) The decision is contrary to the Commission's order to expedite, and it prejudges issues which have yet to be briefed; (2) It falsely accuses Sea-Land of not cooperating whereas in reality, Sea-Land asserts that it has submitted three proposals (two of which were allegedly totally ignored) for resolution of the subject problem; (3) The Administrative Law Judge erroneously failed to find that there is no "crisis" or other conditions which would prevent the *Great Land* from adequately mooring at Terminals 2 and 3 during February and March; (4) The decision is incorrect in finding that Sea-Land would occupy the berth virtually 100% of the time, Sea-Land contending that the evidence shows that the carrier would occupy Berth 1 only about 50% of the time; (5) The finding in the decision that subsequent to February 1, 1976, Totem's only berthing site

[5] Coastal does not operate to Anchorage during the severe winter months but does resume service on or about April 1. The cement barge can only utilize Terminal 2 because the cement headers are located at Terminal 2.

at Anchorage will be Terminals 2 and 3, which Totem claims is unsafe and inefficient, is erroneous because it is not supported by the evidence; (6) The interim decision erroneously failed to find that Sea-Land's decision to agree to move to Terminal 2, was based on several factors, including Anchorage's commitment to lease Sea-Land lot 3–A and to make available transit area B; (7) The decision contains an incorrect finding that Sea-Land has completed its 104 preferential calls; and, (8) The Interim Initial Decision is in error, to the extent it finds that, unless T–1685–6 is conditionally approved, Sea-Land will be able to bar its only major competitor from berthing and thus retain its monopoly over general waterborne cargo into the Port of Anchorage.

In its brief in support of its exceptions, Sea-Land reiterates many of the arguments previously made by the parties concerning conditional approval of Agreement No. T–1685–6. However the major thrust of Sea-Land's contentions is directed at the findings of the Administrative Law Judge, regarding the relative efficiency of Totem's operation between the POL-Terminal 1 facility and Terminal 2.

Sea-Land also argues that the construction by Totem of trestles at the POL-Terminal 1 location, is one of the issues to be determined in the proceeding, and that until there is a decision as to whether the construction of such trestles constitutes a violation of section 15, Totem should not be rewarded by "artificially" increasing its ability to utilize that trestle system by calling at Terminal 1.

Tesoro, while initially supporting some form of temporary approval, now urges that the Interim Initial Decision be rejected because it has no foundation in the record, is contrary to the evidence, contradicts the rationale stated for temporary approval, and seriously prejudices the parties' rights to a fair hearing. In the alternative, Tesoro submits that, if the Commission determines to grant temporary approval of T–1685–6, it should do so solely on the safety issue, as briefed by the parties, and not on the grounds stated in the Interim Initial Decision. Moreover, it would limit such temporary approval to 60 days commencing February 1, 1976.

Tesoro further objects to the Interim Initial Decision on the same grounds cited by Sea-Land; namely, that while the supposed need for temporary approval revolved around the possibility that Totem would be unable to use Terminals 2 and 3 during certain months because of the possibility of severe icing, Judge Levy expressly declined to rule on the safety issue, but instead based his decision on other grounds.

Tesoro challenges Judge Levy's conclusion that Totem will be unable to continue in service at Anchorage, unless Sea-Land is moved to Terminal 2. According to Tesoro, this conclusion assumes a finding not made by Judge Levy in his decision, i.e. that the *Great Land* could not berth at Terminals 2 and 3 during the 90-day period in question. In this regard Tesoro points out that Judge Levy had an opportunity to base his decision on the one factor which would have precluded Totem from utilizing Terminals 2 and 3, namely, the severe weather conditions, but

expressly declined to do so on the grounds that it was unnecessary. Absent a finding that Totem could not utilize Terminals 2 and 3, Tesoro submits that there is no justification for the conclusion that Totem would be unable to continue in service.

Tesoro next attacks Judge Levy's finding of relative efficiency between POL-Terminal 1 and Terminal 2. Tesoro argues that the record in the proceeding actually contradicts the finding that Totem's operations at Terminal 2 are less efficient than at Terminal 1. In support of this contention Tesoro points out that the record shows that during the period Totem has called at Anchorage on a first-come-first-served basis, its best off-loading time was accomplished at the "less efficient" Terminal 2.

The 90-day time period for interim approval is also subjected to strong criticism by Tesoro, on the basis that no explanation is provided in the opinion as to why the 90-day period was selected. If, as Judge Levy concludes, the *Great Land* must be berthed at POL-Terminal 1 in order to promote efficiency and to preserve its position as a competitor in the trade, Tesoro questions why the public interest ceases on May 1, 1976. While Tesoro believes that this period was arrived at because of Totem's claim that it could not berth at Terminal 2 during the winter months, Tesoro questions its soundness in fact, since the safety problem was not considered by the Administrative Law Judge, and the public interest considerations chosen as a basis for his decision, bear no rational relation to the period selected to measure the relief granted.

Finally, Tesoro argues that the Interim Initial Decision violates the parties' rights to a fair hearing, by prejudging the ultimate issues to be decided in the hearing, citing as an example, Judge Levy's finding that Totem is more efficient at POL-Terminal 1.

While initially favoring temporary approval of Agreement No. T–1685–6 as a safety matter, if there was a genuine risk to the *Great Land*, Tesoro now takes no position as to whether this finding should be made. However, Tesoro urges that the safety problem, if it exists at all, cannot be found to extend beyond the period when heavy ice conditions can reasonably be expected to be present at Anchorage.

Anchorage finds no merit in the exceptions, and reasons that Sea-Land's "heated opposition to approval of its own agreement is that it believes it will be able to impair Totem's ability to compete if it can stall the approval of its own agreement."[6]

With respect to exceptions raised by Tesoro, Anchorage argues that "they amount to no more than a claim that because it [Tesoro] misunderstood the scope of the interim approval issue, the Law Judge therefore impermissably [sic] made findings of fact which Tesoro does not consider directly relevant." Anchorage states that the parties did brief the "efficiency" issue and the Law Judge's findings respecting the

[6] Sea-Land filed a "Motion to Strike" this language and certain other argument contained in Anchorage's Reply. Since our decision herein does not stand or fall on the specific language and arguments objected to by Sea-Land the motion is denied.

improved efficiency at POL-Terminal 1 are, alone, sufficient to justify interim approval. Anchorage also urges rejection of Tesoro's request for 60-day approval, citing support in the record for 90 days.

Hearing Counsel agrees with the exceptions insofar, as they find that the Interim Initial Decision should not have been based on the question of the relative efficiencies of Totem's various berthing options. However, Hearing Counsel submits that the fact that the record does demonstrate that Totem has elected not to risk docking at Terminals 2 and 3 during severe winter ice conditions, is sufficient to find that Sea-Land's preferential agreement may force Totem out of the trade for several months. This finding, in turn, justifies a temporary approval of Agreement No. T–1685–6 for 90 days.

Totem is of the opinion that the interim decision is supportable on the grounds that the public interest warrants transferring Sea-Land to the site where its operations are most efficient; also, that Totem should not be forced to take the risk of berthing at Terminals 2 and 3 during periods of severe icing. Thus, Totem believes that, since the interim decision enables Totem to remain in the trade through the winter, it serves the public interest and should be affirmed.

Totem asserts that Tesoro's objections relate to the rationale—as opposed to the results—of the decision. On this point, Totem takes the position that since Judge Levy ruled that "the parties do not . . . waive any arguments they have previously made nor is such non-objection to be deemed in any way prejudicial to their rights otherwise" Tesoro should not be concerned over the "grounds" of the decision when it agrees with the result.

As an alternative basis for the decision, Totem supports Tesoro's argument that the Commission grant approval of Agreement No. T–1685–6, solely on the safety issue as briefed by the parties. Totem finds adequate support in the record for such a finding.

Finally, Totem disputes Tesoro's argument that only a 60-day approval of the agreement is required. According to Totem, the ice season in Alaska extends through the third week in April, and a 90-day approval would eliminate the possibility that the parties would have to return to the Commission for an extension of approval.

Discussion and Conclusions

The record is quite clear that the catalyst for the interim decision was a statement made by Mr. William B. Maling, President of Totem, during the course of the hearing, to the effect that Totem's vessel, the *Great Land* could not be safely berthed at Terminals 2 and 3 during conditions of severe icing. The resumption of preferential berthing rights of Sea-Land at Terminal 1, coupled with the use of the POL facility by other carriers, would preclude Totem from effectively utilizing any berth at Anchorage during the period that it was unsafe to berth at Terminals 2 and 3.

This problem precipitated several discussions among counsel and Judge Levy, culminating in a proposal by Anchorage and Totem that interim approval be given to Agreement No. T–1685–6, so that Terminal 1 would be available to Totem on a non-preferential basis. All parties with the exception of Sea-Land agreed to the proposal, and it was determined to submit briefs on this limited issue to be filed on an accelerated schedule so that an interim decision could be rendered prior to February 1, 1976.

Unfortunately, Judge Levy in his Interim Initial Decision declined to reach a determination on the safety issue, and, instead, based his approval of Agreement No. T–1685–6 on the relative efficiencies of POL-Terminal 1 and Terminals 2 and 3, as applied to Totem's operations. As such, his decision is based on issues that were not properly noticed by the Administrative Law Judge and thus not fully briefed by the parties, and ignores the one central issue which gave rise to the problem and on which the parties had concentrated their arguments. In so doing, the Presiding Officer erred.

Judge Levy's rationale in support of his decision is somewhat confusing. Striking at what he considered to be the heart of the problem presented in this interim proceeding, Judge Levy stated:

> Unless the berthing provision of Sea-Land's present preferential agreement is suspended, or Agreement No. T–1685–6 is conditionally approved for an interim period, Sea-Land will be able to bar its only major competition from berthing and thus will be able to retain its monopoly over general waterborne cargo into the Port of Anchorage.

Unanswered, however, is the question of how the relative efficiencies of POL-Terminal 1 and Terminals 2 and 3 would enable Sea-Land to "bar its only major competition."

While it is true that POL-Terminal 1 is more desirable to Totem, because of the three off-loading ramps, there is no evidence in the record to indicate that, *absent severe icing conditions,* continued use of Terminals 2 and 3 by Totem during interim period, would drive the carrier from the trade. The only sound basis for Judge Levy's unexplained observation would be that severe icing conditions at Terminals 2 and 3 would actually preclude Totem from utilizing that berth. In that event, Sea-Land's preferential use of Terminal 1 would lend credence to the statement. The safety issue was not, however, decided by Judge Levy.

We agree with Tesoro's argument that the 90-day period of temporary approval bears little relation to the basis upon which the Administrative Law Judge decided the case. Presumably, Judge Levy is anticipating a final decision by the Commission within 90 days. However, if that decision should not be forthcoming, the parties would have to request a further extension of the approval. Assuming the validity of Judge Levy's finding with respect to the carrier's relative efficiencies at the Anchorage facilities as a basis for his decision, it would appear to have been more logical to approve Agreement No. T–1685–6, until such time as the Commission rendered its final decision. Certainly, under Judge Levy's rationale the public interest consideration would not necessarily expire in

90 days. While a finding that limited approval based on the safety factor and the 2 to 3 month winter period is consistent with the record, Judge Levy's basis for limited approval lacks any foundation in the record and must be rejected.

Our decision herein is not meant to imply that the findings of Judge Levy with respect to operating efficiencies at Anchorage are necessarily erroneous. We have not reached a determination as to that issue, simply because we believe that the interim proceeding is not the proper forum for a resolution of this particular matter. As we see it, the need for an interim decision arose because of a very specific problem, i.e. the question of safety to Totem's vessel, the *Great Land*, if it was required to utilize Terminals 2 and 3 during periods of severe icing. We have confined our discussion and decision solely to that limited issue, to ensure that the contentions, positions, defenses and rights of each and every party with respect to other matters still pending before the Administrative Law Judge are not prejudiced.

Judge Levy declined to reach a decision on the safety issue, ostensibly because there were other considerations of the public interest which warranted the utilization of POL-Terminal 1 by Totem. Perhaps a more significant reason was "the conflicting evidence whether the *Great Land* can be safely berthed at Terminal 2–3 during the heavy icing period." We can sympathize with Judge Levy on this point. The testimony is conflicting as to whether icing conditions at Anchorage will become so severe as to preclude the *Great Land* from berthing at Terminals 2 and 3.

However, severe icing does occur at Anchorage, and there is the *real possibility* that the *Great Land* could be damaged because of the mooring situation and the weather conditions. Totem has indicated in the record that it will not berth at Terminals 2 and 3 during severe icing conditions, because of the risk to the vessel and her crew. If Totem cannot use POL-Terminal 1, even on a first-come-first-served basis, it may be forced to leave the trade, at least on a temporary basis.

While there exists a legitimate dispute over whether the *Great Land* could, in fact, safely berth at Terminals 2 and 3 during periods of severe icing, in Totem's estimation, the risk of damage to its vessel and injury to its crew is so real that it has served notice of its intention not to berth at Terminals 2 and 3 under such conditions. Based on all the available evidence before us, we find that Totem's refusal to use Terminals 2 and 3 under such conditions is reasonable and based in good faith on a fear of injury to the vessel and her crew. As a result, Totem's assertion that it would leave the trade rather than serve Anchorage under these conditions, is not an idle threat, but a responsible business decision which must be taken seriously.

From every indication at this time, the continuation of Totem's service to Anchorage is in the public interest and should be maintained if possible. The design of Totem's vessel enables her to carry outsized cargoes which Sea-Land cannot accommodate. Shippers have apparently

recognized the benefits offered by Totem's service, as evidenced by *Great Land's* initial heavy load factors. Thus, Totem's operation to Anchorage provides a new, flexible service, and the benefits of competition, as well as increased revenues to Anchorage. Judge Levy considered Totem's contribution to the trade, recognized this public interest factor and, in fact, used it as the basis for his decision.

We believe that a decision substantially in conformity with Judge Levy's could be rendered on the record, but based solely on the safety issue. This alternative, however, would place Sea-Land in the position of accepting approval of Agreement No. T–1685–6, on conditions which it has indicated are not satisfactory to it at this time. In any event, we do not believe that we can properly determine the merits of these conditions inasmuch as the parties did not fully brief this aspect of the case for purposes of the Interim Initial Decision. In addition, this matter is still pending before the Administrative Law Judge and we are reluctant to take any action which could be construed as prejudging ultimate issues.

Approval of Agreement No. T–1685–6, as originally submitted to this Commission, would also allegedly present a number of problems for Sea-Land, and could adversely affect Sea-Land's operations at Terminal 2. For example, Sea-Land contends that approval, even on an interim basis, of Agreement No. T–1685–6 without providing for an adequate back-up area to Terminals 2 and 3 could increase congestion and inefficiency which would translate into increased costs. Also, under an approved preference at Terminal 2, Sea-Land would be locked into using that facility on a full-time basis even though Totem would call at Terminal 1 only about once a week. Sea-Land contends that to require it to use Terminal 2 even when Totem is not at Terminal 1 will impair Sea-Land's operating efficiency without any countervailing enhancement in the efficiency of Totem.

Sea-Land's arguments in this regard are persuasive. Accordingly, it is our opinion that approval of Agreement No. T–1685–6 at this time, could create more problems than it will solve, and is unnecessary since more viable alternatives are available.

It is our opinion that the continued use of Terminal 1 by Sea-Land on a preferential basis is contrary to the public interest in violation of section 15, Shipping Act, 1916, in that there is a real possibility that it will serve to effectively preclude Totem from offering a competitive common carrier service to the Port during periods of severe icing conditions. Therefore, Agreement No. T–1685, as amended through T–1685–5 will be disapproved, effective February 5, 1976, unless the parties to that agreement, prior to that date, file with the Federal Maritime Commission an amendment to Article 1(a) of the Agreement (the preferential berthing rights clause) inserting at the end thereof, the following clause:

. . . provided, however, that effective February 5, 1976, such preferential berthing rights shall not apply during the months of February, March and April 1976.

Disapproval of Sea-Land's preferential berthing rights during the winter months will place all parties serving Anchorage, on a first-come-first-served basis. This will maintain the status-quo under which Sea-Land and Totem are presently calling at Anchorage, and the record does not disclose that either carrier has suffered severe economic disadvantage under such an arrangement. While in the long run, a preferential berthing arrangement may prove to be more economically viable, service to Anchorage on a non-preferential basis for the interim period would not appear to significantly affect the operations of either carrier.

A number of parties, including Hearing Counsel, Tesoro, Anchorage and Totem, had recommended that the Commission *suspend* Agreement No. T–1685, pending the outcome of the proceeding, if Sea-Land refused to accept temporary approval of Agreement No. T–1685–6. This alternative of suspension is not open to the Commission under section 15. *Pacific Coast European Conference—Payment of Brokerage*, 5 F.M.B. 65, 69 (1956).

However, as proposed herein, the parties themselves may modify the agreement so as to suspend the effectiveness of Sea-Land's preferential berthing rights during the months of February, March, and April of 1976. In the event the parties file the prescribed amendment to Article 1(a), the remaining provisions of Agreement No. T–1685 would continue as presently approved. Failure to file such an amendment will of necessity result in disapproval of the complete agreement, inasmuch as Article 1(a) is included therein.

Our disposition of the matter in this manner is not only consistent with the record in this proceeding and in conformance with the law, but is the least disruptive to the parties involved, and avoids the problem encountered by Judge Levy of possibly prejudging ultimate issues in the proceeding. Moreover, it will enable all parties to serve Anchorage on equal terms, pending the outcome of the proceeding.

One final point should be mentioned. On January 19, and January 27, 1976, Sea-Land filed Petitions to Reopen pursuant to Rule 13(j) (46 CFR 502.230(d)), for the purpose of receiving additional and current evidence on the actual use during the winter ice season of Terminals 2 and 3 by Totem. Responses were filed in opposition by Anchorage and Totem. Tesoro filed a response supporting Sea-Land's petitions. Generally, the arguments, pro and con, relate to Totem's ability to utilize Terminals 2 and 3 during the months of November, December and January, and the possible implication this might have with respect to Totem's use of that facility in February, March and April.

We find that Totem's present ability to utilize Terminals 2 and 3 bears little relevance to its ability to call at the facility in the severe winter months of February and March. This is the very basis of our decision; namely, the *real possibility* of severe icing, and Totem's reasonable fear of injury to vessel and crew which warrant Totem's refusal to call at Terminals 2 and 3. Neither we, nor anyone else, can predict whether

such conditions will occur. Sea-Land's submittal can provide no evidence to alter our conclusion, and the petitions are, therefore, denied.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-35

AGREEMENT NOS. T-1685 AS AMENDED AND T-1685-6: BETWEEN THE CITY OF ANCHORAGE AND SEA-LAND SERVICE, INC.; AND AGREEMENT NO. T-3130: BETWEEN THE CITY OF ANCHORAGE AND TOTEM OCEAN TRAILER EXPRESS, INC.

ORDER

This proceeding is before the Federal Maritime Commission on exceptions to the Interim Initial Decision of Administrative Law Judge Levy wherein he found that:

1. Temporary approval of Agreement T-1685-6 for 90 days is in the public interest and would serve a serious transportation need.
2. Approval is on condition that during cement off-loading operations Sea-Land will berth in a manner not to interfere with such operations.
3. If Sea-Land does not accept the temporary and conditional approval of preferential berthing rights at Terminal 2 then previously approved preferential berthing rights for Sea-Land at Terminal 1 are rescinded.

We have reviewed Judge Levy's decision and the various exceptions and responses filed in connection therewith and, in view of the urgent need for Commission action on this matter prior to February 1, 1976, we are issuing this Order at this time to be followed by our Report, fully explaining its basis, within a few days.*

THEREFORE, for reasons to be fully enumerated in our Report,

IT IS ORDERED, That the Interim Initial Decision of Administrative Law Judge Levy is hereby reversed on the grounds that the decision was based on issues not fully briefed by the parties, and that it ignored the one central issue which gave rise to the need for interim action.

IT IS FURTHER ORDERED, That because Sea-Land Service, Inc.'s preferential berthing right at Terminal 1 at the Port of Anchorage is contrary to the public interest in violation of section 15 of the Shipping Act, 1916, in that there is a real possibility that it will serve to effectively

*This Order is made without prejudice to the contentions, positions, defenses and rights of each and all of the parties hereto in the matters pending before the Administrative Law Judge.

preclude Totem Ocean Trailer Express Service, Inc. from offering a competitive common carrier service to the Port during periods of severe icing conditions, Agreement No. T–1685, as amended through T–1685–5, is hereby disapproved effective February 5, 1976, unless the parties to that Agreement, prior to that date, file with the Federal Maritime Commission an amendment to Article 1(a) thereof, inserting after the first sentence the following clause:

. . . provided, however, that effective February 5, 1976, such preferential berthing rights shall not apply during the months of February, March and April 1976.

IT IS FURTHER ORDERED, That Sea-Land's Petition to Reopen are denied.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 338(I)

UNION CARBIDE INTER-AMERICA, INC.

v.

VENEZUELAN LINE
(COMPANIA ANONIMA VENEZOLANA DE NAVEGACION)

NOTICE OF DETERMINATION NOT TO REVIEW

February 10, 1976

Notice is hereby given that the Commission on February 10, 1976 determined not to review the decision of the Settlement Officer in this proceeding served January 30, 1976.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 338(I)

UNION CARBIDE INTER-AMERICA, INC.

v.

VENEZUELAN LINE
(COMPANIA ANONIMA VENEZOLANA DE NAVEGACION)

Reparation Awarded.

DECISION OF WALDO R. PUTNAM, SETTLEMENT OFFICER[1]

By complaint filed November 14, 1975, Union Carbide Inter-America, Inc. (complainant) alleges that Venezuelan Line (carrier) assessed ocean freight charges on two separate shipments which were in excess of those lawfully applicable at the time of the transportation. While the complainant does not specifically allege a violation of the Shipping Act, 1916, it is presumed to be section 18(b)(3).

The carrier denied the involved claims solely on the basis of Rule 11, United States Atlantic & Gulf Venezuela and Netherlands Conference Tariff No. 2, S.B. VEN–11, which time-bars claims for adjustments not received by the carrier within six months from the sailing date of the vessel.

In support of its claims, the claimant furnished copies of its claims Nos. 1954 and 2002 accompanied by corresponding copies of the bills of lading; commercial invoices; export declarations; and relevant correspondence.

Claim No. 1954 involves a shipment of 73 fibre drums of Synthetic Resin Polyethylene from New York to Puerto Cabello on March 15, 1974, which was assessed total transportation charges of $1,622.06. The shipment weighed 23,214 pounds; contained 852 cubic feet; and had an actual value of $6,460.50 (between $500 and $700 per 2000 pounds). The shipment was rated as 852 cubic feet at $68.25 per 40 cubic feet,[2] which

[1] Both parties having consented to the informal procedure of Rule 19, 46 CFR 502.301–304 (as amended) this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2] $68.25 was the applicable W/M rate for Resin Synthetic, Viz: N.O.S. in other packing—actual value over $300 but not over $500 per freight ton.

produced ocean freight revenue of $1,453.73 plus accessorial charges assessed on a per cubic foot basis ($168.33).

Item 495 of the aforementioned Conference tariff provides a specific rate on Resins, Synthetic, in bags or fiber drums, Viz: Polyethylene, actual value over $500 but not over $700 *per 2000 pounds*. Rating the shipment under this specific tariff provision would have produced ocean freight revenue of $809.59 plus accessorial charges assessed on a weight basis ($92.72). Accordingly, the complainant was overcharged on this particular shipment in the amount of $719.75 ($1,622.06 less $902.31).

Claim No. 2002 involves a palletized shipment of 440 bags of Synthetic Resin Polyethylene from New York to La Guaira on August 16, 1974 which was assessed total transportation charges of $1,084.56. The shipment weighed 22,440 pounds, net; contained 571 cubic feet; and had an actual value of $7,480.00 (between $500 and $700 per 2000 pounds). The shipment was rated as 571 cubic feet at $69.75 per 40 cubic feet[3] which produced ocean revenue of $995.68 less pallet discount of $35.67 plus accessorial charges assessed on a per cubic foot basis ($124.55). This shipment also should have moved under the specific rate in Item 495 discussed above. When rated on a weight basis, the shipment produces ocean revenue of $782.60 less pallet discount of $28.05 plus accessorial charges of $100.72. Accordingly, the complainant was overcharged on this shipment in the amount of $229.29 ($1,084.56 less $855.27).

The involved claims were denied by the carrier solely in accordance with its published tariff provisions, which read in pertinent part that: "claims by shippers for adjustment of freight charges will be considered only when submitted in writing to the carrier within six months of date of shipment." The merits of the claims were not an issue in the denial thereof. The carrier, however, in responding to the served complaint, not only admitted that the shipments were incorrectly rated, but, requested that a ruling in favor of the complainant be issued.

The Commission, in Informal Docket No. 115(I), *Colgate Palmolive Company* v. *United Fruit Company* reiterated what is specifically stated in *Proposed Rules—Time Limit on Filing Overcharge Claims* 12 F.M.C. 298, 308 (1969) that:

> ". . . once a claim has finally been denied by a carrier the shipper may still seek and in a proper case recover reparation before the Commission at any time within 2 years of the alleged injury, and this is true whether the claim has been denied on the merits or on the basis of a time limitation rule."

Section 18(b)(3) of the Shipping Act, 1916, makes it unlawful for a carrier to charge, demand, collect or receive a greater compensation than the rates or charges which are specified in its tariff.

The filing of a timely complaint with this Commission effectively overrides any tariff technicality under which an overcharge claim legally

[3] $69.75 was the applicable W/M rate for Resin Synthetic, Viz: N.O.S. in other packing—actual value over $500 but not over $700 per freight ton.

may be denied by a water carrier subject to our jurisdiction during the 2-year statutory period for recovering reparation set forth in section 22 of the Shipping Act, 1916. A proper case for the recovery of reparation having been made, a refund in the amount of $949.04 is due the claimant; and it is so ordered.

(S) WALDO R. PUTNAM,
Settlement Officer.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 473

HOMASOTE CO.

v.

UNITED STATES LINES, INC.

NOTICE OF ADOPTION OF INITIAL DECISION

February 17, 1976

The initial decision in this proceeding was served January 19, 1976, and no exceptions have been filed. Notice is hereby given that the Commission has determined to adopt the initial decision subject to the qualifications discussed herein.

The initial decision makes several references to the fact that applicant is seeking a "waiver" of charges in this proceeding. Any such references in the initial decision should be to "refund" of charges inasmuch as payment has already been made.

While relief under special docket procedures is denied herein, our review of the application and pertinent tariff matters discloses that Homasote Co. may have been charged a rate other than that which was applicable. The application states the applicable rate for advertising material was $143.75 WM. Our review of the tariff indicates that the rate for such commodity in fact was $108.75 WM.

Attention is called to the Commission's formal complaint procedures (46 CFR. 505.62) and informal docket procedures for claims of $5,000 or less (46 CFR. 502.301 et seq.) under which a claim for reparation on overcharges of ocean freight may be filed within two years from the date a cause of action accrues.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 473

HOMASOTE CO.

v.

UNITED STATES LINES, INC.

Adopted February 17, 1976

Application for permission to waive collection of a portion of the freight charges denied..

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

By application filed June 16, 1975, United States Lines (USL) has applied for permission to waive collection of a portion of the freight on a shipment of advertising material carried under bill of lading dated March 29, 1975, on the *American Ace* from Baltimore to Hamburg, Federal Republic of Germany. The rate applicable at the time of shipment is alleged to be Item 890.0001.001, Advertising Matter, including Samples and Metal Display Stands, N.E.S., Packed, $143.75 WM,[2] resulting in a charge of $6,748.57. The application states:

> This appears to have been an unfortunate situation where both Consignor and his forwarder shipped this cargo without first checking the rate. It would appear that the carrier's rate clerk applied the correct rate in effect at the time of shipment. However, had Consignor or his forwarder applied to the Conference for relief for a special rate for 30 days, the Conference would have at least given the benefit of Item 890001001 minimum rate of $50.50 WM. This especially in view of the extremely low value of the shipment.

The aggregate freight charges sought to be refunded are $4,377.77.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications,* Rules of Practice and procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

[1] This decision became the decision of the Commission on February 17, 1976.

[2] North Atlantic CONTINENTAL Freight Conference Tariff No. (29) FMS 4, 10th Rev. Page 258, Effective Date February 9, 1975.

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[3] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[4] states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

As observed before, refund or waiver of collection of a portion of the freight is permitted where "there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff." Misinterpretation of a tariff is not subject to rectification under P.L. 90–298. *Commodity Credit Corporation v. Delta Steamship Lines, Inc.*, 14 SRR 1207 (1974). The failure of the consignor or forwarder to check a rate prior to shipment is not the kind of circumstance for which section 18(b)(3) affords relief. Moreover, if the 11th revision of Page 258, Effective April 7, 1975, is taken as a new tariff filed prior to applying for authority to waive collection of a portion of the freight charges, it fails to set forth the rate on which such waiver would be based.

In the absence of exemptive authority, the Commission may not permit deviations from the rates on file. Accordingly waiver of collection of undercharges may not be granted and authorizations of refunds of

[3] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

[4] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges*, under *Purpose of the Bill.*

overcharges are unnecessary.[5] The application for permission to waive collection of a portion of the freight must therefore be denied.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
January 19, 1976..

[5] *Mueller v. Peralta Shipping Corp.*, 8 F.M.C. 361 (1965), and *Tilton Textile Corp. v. Thai Lines, Ltd.*, 9 F.M.C. 145 (1965). See also *Louisville & N. R. R. Co. v. Maxwell*, 237 U.S. 94 (1915).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 467

UNION ENGINEERING, KUWAIT

v.

IRAN EXPRESS LINE

NOTICE OF ADOPTION OF INITIAL DECISION

February 12, 1976

The Commission by notice served February 12, 1976, declared its intention to review the initial decision of the Administrative Law Judge in this proceeding. Upon review of the record in this proceeding, the Commission has now determined that the decision of the Administrative Law Judge is proper and well founded. Accordingly, notice is hereby given that the initial decision became the decision of the Commission of February 18, 1976.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 467

UNION ENGINEERING, KUWAIT

v.

IRAN EXPRESS LINES

Adopted February 12, 1976

Application to waive collection of a portion of the freight charges denied.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

By application dated February 21, 1975, Iran Express Lines (IEL) has applied for permission to waive collection of a portion of the freight on a shipment of road building machinery under bill of lading dated December 11, 1974. IEL carried this shipment on the *M. V. Philippine President Garcia* from New York to Kuwait. The rate charged was lump sum $17,500.00. The rate applicable at the time of shipment was Item 700, $150.00 W/M plus $48.25 per 2240 pounds, heavy lift,[2] which would have resulted in a charge of $18,485.54. Permission is therefore requested to waive collection of the excess of $985.54. As grounds for the waiver the application offers only the statement, "Misfiling due to clerical error. All supporting documents attached." The supporting documents are copies of the bills of lading; copies of manifest correction sheets; copies of invoices setting forth docking charges; and a copy of one page from the tariff rules and regulations of IEL. The shipment was described on the two bills of lading as soil stabilizing machines and spare parts. On December 23, 1974, IEL filed a new rate on which the waiver would be based.[3] Instead of road building machinery or soil stabilizing machines and spare parts, the lump sum rate would be for Motorgraders.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special*

[1] This decision became the decision of the Commission February 12, 1976.

[2] Iran Express Lines—F.M.C. No. 1, Page 6, First Revised Page 5–A, Effective Date 8/20/74, Correction 75.

[3] Iran Express Lines—F.M.C. No. 1, MOTORGRADERS, About 57 M/Tons and 12 L/Tons each, one shipper, one receiver, one port of loading, one port of discharge, including all surcharges Lumpsum $17,500.00.

Docket Applications, Rules of Practice and procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[4] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[5] states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

On the record presented, a determination cannot be made. As observed before, refund or waiver of collection of a portion of the freight is permitted where "there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff." The statement, "Misfiling due to clerical error. All supporting documents attached.", is in no way explanatory of the character of the error. The "supporting documents" do not achieve their intended purpose because they do not reveal what the clerical error was.

If freight charges are to be waived on the basis of this conclusory statement, the applicant for waiver becomes the arbiter of what constitutes clerical error—a function reserved to the Commission by the statute.

Since the exemptive clause is not applicable to the situation presented,

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[4] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

[5] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges*, under *Purpose of the Bill.*

then the general rule of *Mueller v. Peralta Shipping Corp.*, 8 F.M.C. 361 (1965), and *Tilton Textile Corp. v. Thai Lines, Ltd.*, 9 F.M.C. 145 (1965), is dispositive of this application. In the absence of exemptive authority, the Commission may not permit deviations from the rates on file. Accordingly, waivers of collections of undercharges may not be granted and authorizations of refunds are unnecessary. The law forbids the former and directs the latter. The application to waive collection of a portion of the freight charges is therefore denied.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
January 9, 1976..

FEDERAL MARITIME COMMISSION

No. 75-54

UNION CARBIDE INTER-AMERICA, INC.

v.

VENEZUELAN LINE
(COMPANIA ANONIMA VENEZOLANA DE NAVEGACION)

NOTICE OF ADOPTION OF INITIAL DECISION

February 18, 1976

No exceptions having been taken to the initial decision of the Administrative Law Judge in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on February 18, 1976.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 75-54

UNION CARBIDE INTER-AMERICA, INCORPORATED

v.

VENEZUELAN LINE
(COMPANIA ANONIMA VENEZOLANA DE NAVEGACION)

Adopted February 18, 1976

Reparation awarded in the amount of $4,421.58.
Carrier incorrectly rated shipment.
Section 18(b)(3) of the Shipping Act, 1916, makes it unlawful for a carrier to charge, collect or receive a greater compensation than the rates which are specified in its staff.

Appearances:

Warren Wytzka, Manager-Liner Services, for complainant.
G. E. McNamara, Traffic Representative, for respondent.

INITIAL DECISION OF STANLEY M. LEVY, ADMINISTRATIVE LAW JUDGE[1]

Complainant shipper seeks reparation in the amount of $4,421.58 claiming respondent carrier overcharged in that amount by wrongfully assessing a shipment of polyethylene synthetic resin in violation of section 18(b)(3) of the Shipping Act, 1916.

Complainant requested and respondent has agreed that the proceeding be conducted pursuant to the shortened procedure provided in Rule 11 of the Commission's Rules of Practice and Procedure, 46 CFR 502.181–187.

The shipment was classified by the carrier as "Synthetic Resin, N.O.S. in other packing. Actual value over $700.00 per freight ton." Pursuant to item 495, tariff no. 11 of the United States Atlantic and Gulf Venezuela and Netherlands Conference (27th revised page 62) the respondent charged a total of $7,630.60.

Complainant contends the shipment should have been described as Fibre Drums Polyethylene Synthetic Resin value over $700.00 but not over $1,000.00 per 2,000 lbs. As such it should have been rated at $86.75

[1] This decision became the decision of the Commission February 18, 1976.

per 2,000 lbs. rather than $111.00 per 40 cubic feet and the proper charge should have been only $3,209.02.

Complainant sought recovery of the difference from the carrier but the claim was rejected solely on the basis that the tariff's rule 11 barred claims for overcharge filed more than six months from the date of shipment.

Both the Union Carbide Invoice No. 8-60688-2 and the Venezuelan Line Bill of Lading No. 62, dated October 25, 1974, read: "220 FIBER DRUMS POLYETHYLENE SYNTHETIC RESIN." These documents clearly specify that the commodity was Polyethylene Synthetic Resin, and that it was shipped in drums. The governing or applicable Venezuelan Tariff No. 11, cited above, has a specific provision for RESINS, SYNTHETIC POLYETHYLENE in fiber drums, actual value over $700.00 but not over $1,000.00 per 2,000 lbs., at $83.75 per 2,000 lbs. The respondent had knowledge from the Bill of Lading that the shipment was made in drums. The respondent erred in selecting the Synthetic Resin, N.O.S. in other packing at a higher rate for the actual material shipped.

In its answer to the complaint respondent admits that the claim filed by the complainant is correct and that the Bill of Lading was rated in error.

The merits are established here by the attested facts given above which clearly show and affirm that an error did exist, that an overcharge was inadvertently made, and that this is a fully valid and supported claim. Complainant's claim was originally denied by respondent on the basis that it was time-barred under the Conference rule. However, the Commission has repeatedly held that in an action such as this which is brought under the Shipping Act, 1916, a claim arising from overcharge cannot be barred from a determination on the merits by a Conference rule, if, as here, the claim is filed with the Commission within two years of its accrual. Hence, the actual description of the shipment as it appears now of record governs the determination of the issue.

This claim has been filed within two years and, consequently, must be considered on its merits. Section 18(b)(3) of the Shipping Act, 1916, makes it unlawful for a carrier to charge, demand, collect or receive a greater compensation than the rates which are specified in its tariff. Accordingly, on the basis of the foregoing reparation in the amount of $4,421.58 is awarded complainant. Respondent shall pay such amount within thirty days of this decision and failing that, interest shall accrue at the prevailing rate per annum.

(S) STANLEY M. LEVY,
Administrative Law Judge.

WASHINGTON, D.C.,
January 22, 1976..

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 330 (I)

CUMMINS ENGINE CO., INC.

v.

UNITED STATES LINES, INC.

March 3, 1976

Reparation granted.

DECISION OF CAREY E. BRADY, SETTLEMENT OFFICER[1]

Cummins Engine Company, Inc. claims $551.08 as reparation from United States Lines, Inc. (USL), for alleged overcharges on three shipments which moved on USL's vessels during March 1973. The first shipment moved on USL's bill of lading No. 631–7301, dated March 23, 1973, from Yokahama, Japan to New York, aboard the American Liberty. The second shipment moved on USL's bill of lading No. 631–7304, dated March 3, 1973, from Yokohama, Japan to New York aboard the American Archer.

The first and second shipments were described on each respective bill of lading as "50 Cases Connecting Rod Assembly". The Bureau of Customs Special Customs Invoice Form 5515 and the shipper's invoice both described the respective cargoes as "50 Cases Connecting Rod Assembly". Bureau of Customs Consumption Entry Form 7501 described the cargoes as "50 Cases Diesel Engine Parts".

Respondent rated the shipments on the basis of $67.25 per 2,000 lbs., which was the applicable rate for "Automobile, Bus and Truck Parts, viz: Other Parts", according to 5320–25 of the respondent's tariff in effect at that time.[2] Total charges on the first shipment were assessed in the amount of $568.06, which included currency surcharges and CFS charge. Total charges were assessed on the second shipment in the amount of $458.39, which included a CY discount of 5%.

The third shipment was described on the bill of lading as "36 Pkgs. 'K

[1] Both parties having consented to the informal procedure of rule 19 of the commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2] Japan-Atlantic & Gulf Freight Conference Tariff No. 34, FMC–3, 14th Revised Page No. 234.

engine' component sets". Bureau of Customs Special Customs Invoice Form 5515 described the cargo as "36 Pkgs. 'K engine component sets". The shipper's invoice and packing list described the cargo as "36 Pkgs. 'K engine' component sets" and details the commodities to be: Head Assembly, Gear Cover, Camshafts, Cylinder Block and Crankshaft. Bureau of Customs Consumption Entry Form 7501 described the cargo as "36 Pkgs. Diesel Engine Parts".

Respondent rated the shipment on the same basis as the first two shipments resulting in total charges being assessed in the amount of $1,578.53, including a 5% CY discount.

Complainant contends that the respondent misclassified the shipments and should have applied the rate of $53.50 per 2,000 lbs., the rate for "Automobile, Bus and Truck Parts, viz: Cylinder Block Assemblies, with or without Crankshafts" as per Item 5320–7.[3] Such a classification would have saved the complainant a combined total of $551.08 on all shipments. Complainant argues in support of its position that the Cylinder Block Assemblies description is broad enough and ambiguous enough to cover any type of a part that goes into, or is attached to, a cylinder block. Further, that description is published without qualification other than with or without crankshafts.

Respondent maintains that in classifying the cargo, it relied on the description on the three bills of lading, namely; Connecting Rod Assembly, and K engine component sets, respectively. Respondent further states that it "is regretted that the shipper did not identify his shipments for what they actually were; namely: 'parts for engine block assembly'. As far as we, here, are concerned, we have no objection to this rate being granted but unfortunately, we feel the final decision, because of the actual description placed on the bills of lading may rest with the Conference Headquarters in Tokyo." The record indicates the Conference does not interpret the cargo shipped to fall in the category of cylinder block assemblies.

The test the Commission applies on claims of reparation involving alleged error of a commodity tariff classification is what the complainant can prove, based on all the evidence as to what was actually shipped, even if the actual shipment differed from the bill of lading description.[4] However, the complainant has a heavy burden of proof once the shipment has left the custody of the carrier.[5]

From the documentation of record, it is clear the commodities actually shipped were unquestionably parts for engines, i.e. connecting rod assembly, head assembly, gear cover, camshaft, cylinder block and crankshaft. The Conference tariff discloses no specific commodity rate

[3] Ibid.

[4] Western Publishing Company, Incorporated v. Hapag-Lloyd A.G., informal docket No. 283(I) Commission Order served May 4, 1972.

[5] Colgate Palmolive Co. v. United Fruit Co., informal docket No. 115(I) Commission Order served September 30, 1970.

for connecting rod assembly, head assembly, gear cover or camshaft. Cylinder blocks and crankshafts are named in the disputed tariff item 5320–7.

Complainant's contention that the commodities shipped are parts of a cylinder block assembly appears to be a reasonable one.

Webster's Third New International Dictionary of the English Language, Unabridged (1964), defines an assembly as:

"5a: the act or process of building up a complete unit (as a motor vehicle), using parts already in themselves finished manufacture products. b: a collection of parts so assembled as to form a complete machine, structure or unit of a machine."

Webster's New World Dictionary, College Edition (1968) defines assembly as:

"4. a fitting together of parts to make a whole, as in making automobiles. . . . . 5. the parts to be thus fitted together."

From the above definitions of an assembly, it can reasonably be concluded that cylinder block assemblies include those parts of an engine that go into or are attached to the cylinder block to make up the end product which can be reasonably considered directly related to the construction of an engine. An exploded view of an engine readily shows a connecting rod, gear cover and camshaft go into, or are directly attached to, the cylinder block.

Tariff Item No. 5320–07 is not at all specific as to what component parts constitute a cylinder block assembly, aside from indicating such assembly may be with or without crankshafts. Such a description is so unclear that reasonable men could differ on its application. Where an ambiguity does exist, then the tariff must be construed in such a manner so as to resolve such ambiguity in favor of the shipper.[6]

In addition, the Commission has long recognized that tariff terms should be interpreted reasonably. In National Cable and Metal Co. v. American Hawaii S.S. Co., 2 U.S.M.C. 471 (1941),[7] the Commission's predecessor stated:

"In interpreting a tariff, the terms used must be taken in the sense in which they are generally understood and accepted commercially, and neither carriers nor shippers should be permitted to urge, for their own purposes, a strained and unnatural construction. Tariffs are to be interpreted according to the *reasonable* construction of their language; neither to the intent of the framers, nor the practice of the carrier controls, for the shipper cannot be charged with knowledge of such intent or with carrier's canons of instruction. *A proper test is whether the article may be reasonably identified by the tariff description*". (underlining supplied)

Since connecting rod assembly, head assembly, gear cover and camshaft are not specifically excluded by Item 5320–7, it can only be concluded that they reasonably fall within the general description of cylinder block assemblies and should have been so rated. A proper case

[6] United Nations Children Fund v. Blue Sea Line, 15 FMC 206, 209 (1972).

[7] Also see Johns Manville Products Corporation, 13 FMC 194, (1970) and Bulkley Dunton Overseas, S.A. v. Blue Star Shipping Corp., 8 FMC 137, 140 (1964).

for the recovery of reparation having been made on the three shipments, a refund in the amount of $551.08 is due to the complainant; and it is so ordered.

(S) CAREY R. BRADY,
Settlement Officer.

FEDERAL MARITIME COMMISSION

No. 75–17

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE CLETO HERNANDEZ R. d/b/a PAN INTER

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER REVOKING LICENSE

March 4, 1976

No exceptions having been taken to the initial decision of the Administrative Law Judge in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on March 4, 1976.

IT IS ORDERED, That Independent Ocean Freight Forwarder License No. 1108, issued to and now held by Cleto Hernandez R. d/b/a Pan Inter is hereby revoked pursuant to Section 44(d) of the Shipping Act, 1916, and Sections 510.9(a), (d), and (e) of Commission General Order 4.

IT IS FURTHER ORDERED, That this Notice and Order be published in the *Federal Register*.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 75–17

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE CLETO HERNANDEZ R. d/b/a PAN INTER

Adopted March 4, 1976

License revoked.

Employment by a shipper precludes qualification as an independent ocean freight forwarder.

Failure to promptly remit sums due a principal is a violation of fiduciary relationship and demonstrates lack of financial responsibility.

Failure to pay over ocean freight charges due a common carrier by water demonstrates a lack of financial responsibility.

The shipping public is entitled to rely upon the responsibility and integrity as well as the technical ability of a freight forwarder. Failure to meet such standard is basis for revocation of a license as a freight forwarder.

Fred Brady for respondent.

Donald J. Brunner and *William J. Cooley* for Hearing Counsel.

INITIAL DECISION OF STANLEY M. LEVY, ADMINISTRATIVE LAW JUDGE[1]

By an Order of Investigation and Hearing issued on May 16, 1975, the Federal Maritime Commission initiated this proceeding for the purpose of determining whether Cleto Hernandez R. continues to qualify as an independent ocean freight forwarder pursuant to sections 1 and 44 of the Shipping Act, 1916, and 510.2(a) and 510.9(d) of the Commission's General Order 4. In addition, the Commission ordered a finding whether the failure to timely remit monies due to a principal in the amount of $4,475 is a violation of section 510.23(f). If was further ordered that a finding be made whether the licensee maintains all records and books of account in accordance with section 510.23(k).

Hearings were held September 23, 1975, in New York, New York.

FINDINGS OF FACT

1. Cleto Hernandez R. d/b/a Pan-Inter is the holder of a license No. FMC–1108 issued and effective January 27, 1966, by the Federal Maritime Commission to operate as an Independent Ocean Freight Forwarder.

[1] This decision became the decision of the Commission March 4, 1976.

2. He conducts the business from his home-business office located at 267 West 89th Street, New York City; has no employees but does have his adult sons as associates and his son, Robert, does incidental work involved in the conduct of the business.

3. The hours of Pan-Inter are daily from 7:00 a.m. to 8:15 a.m. and after 4:30 p.m. and on week-ends when required.

4. Cleto Hernandez R. has been employed by Continental Can Company (CCC) since April 7, 1969. CCC is a publicly owned corporation engaged in the business of container manufacturing and ships some of its products by oceangoing common carriers.

5. CCC is a publicly owned corporation with more than four million outstanding shares. Nine shares are owned by Cleto Hernandez R.

6. Mr. Hernandez's duties and title are Billing Supervisor. He supervises two employees and is charged with the preparation of invoices, both domestic and foreign; analysis reports, and statistical distribution of reports for inter-company use. He works at CCC from Monday through Friday between the hours of 8:30 a.m. and 4:30 p.m.

7. CCC does not employ Pan-Inter nor Cleto Hernandez R. to do any freight forwarding, has not referred any business to Pan-Inter, nor does Pan-Inter perform any service with companies related by business with CCC.

8. CCC employs at least five licensed freight forwarders, including Schenkers International Forwarders, American Union Transport Forwarding, Meadows, Wye & Co., Alonso Shipping Co. and Seaport Shipping Co.

9. Respondent does not use the office space, secretary, or facilities of CCC to conduct Pan-Inter business. Nor does he maintain any Pan-Inter supplies or stationery at CCC.

10. CCC and Pan-Inter clients both ship to some of the same destinations (Santo Domingo, for example), but do not otherwise ship via the same vessels, or to the same ports, or to the same agents.

11. Pan-Inter in 1972 performed freight forwarding services for 30 shipments; in 1973 for 43 shipments, in 1974 for 23 shipments. None of these shipments were for the account of CCC.

12. Pan-Inter sustained operating losses during four consecutive years:

	Receipts	*Net Operating Loss*
a. 1970	$1,030.52	$ 961.98
b. 1971	722.75	1,019.75
c. 1972	731.89	1,108.11
d. 1973	1,251.00	766.50

13. On or about April 16, 1974, Pan-Inter prepared the shipping documentation and Sales Invoice for a shipment of export goods from Brizel Leather Company (Brizel) in New York City to Fabrica de Sombreros Tropicales Lara in Venezuela.

14. The shipment sailed on or about May 31, 1974.

15. The Sales Invoice identified four charges in addition to the cost of the goods, viz., inland freight to pier and handling—$48.95; ocean freight—$243.93; insurance—$82.20; documentation and handling—$35.25 and cost of goods—$4,475.

16. When the four prepaid charges of $410.93 are added to the cost of the goods, $4,475, the total is $4,885.93.

17. Pan-Inter sent the bill of lading and invoices to the Banco de Venezuela which remitted the total amount of $4,885.93 to Pan-Inter directly at the office address of 267 West 89th Street.

18.Cleto Hernandez R. had the responsibility to retain only the amount of advanced expenses ($410.93) and remit the remainder ($4,475) to Brizel.

19. The amount of $4,783.83 was deposited in the Banker's Trust Company account #10-054-715 on June 16, 1974, being a joint account of Cleto Hernandez R. and/or Hilma de Hernandez, where it was commingled with the personal funds of Cleto Hernandez R.

20. The difference between $4,885.93 received and $4,783.83 deposited ($102.10) was used for some unexplained purpose.

21. In the transaction relating to the Brizel shipment, the deposited amount of $4,783, received and deposited on June 19, 1974, was depleted to a $37.64 balance on October 17, 1974, before repayments began.

22. The money received on behalf of Brizel had been used for other freight and personal expenses.

23. The deposit of $4,783.83 was the second largest amount of money placed into Mr. Hernandez's account during the year 1974.

24. Pan-Inter had used only the bank account at Banker's Trust Company, #10-054-715, for all receipts and disbursements relating to forwarding services during the years 1972, 1973 and 1974.

25. This account was also used for personal buriness, in addition to Pan-Inter, until a Federal Maritime Commission investigator advised separate accounts.

26. After some months had passed, and upon inquiry from Brizel as to the monies due them, on November 18, 1974, Pan-Inter offered to pay the full amount owing to the company, by providing seven checks, drawn upon Banker's Trust Company account #10-054-715, the first of which was payable on November 27, 1974.

27. The other six checks, plus an additional check sent the next day, were paid through March 1975 and satisfied the debt in full.

28. Licensee has an outstanding debt to Sea-Land Service, Inc. (Sea-Land), a common carrier by water.

29. Sea-Land obtained a default judgment against Cleto Hernandez R. t/a Pan-Inter Freight on February 21, 1975, in the amount of $2,946.11. Of this amount $2,668.61 was the sum originally owed, $180.00 is interest thereon from November 21, 1973, and $97.50 costs.

30. Of the sums due Sea-Land, the outstanding balance was $2,256 as of the date of hearing, September 23, 1975.

DISCUSSION

For several reasons, all of which are set forth in detail hereafter, the license of Cleto Hernandez R. d/b/a Pan-Inter, must be revoked.

The license must be revoked because Cleto Hernandez R. is no longer an independent ocean freight forwarder. On October 8, 1965, at the time of his application for a license, respondent asserted that he was "familiar with the Shipping Act of 1916, [and] all pertinent Acts and rules and regulations pertaining to the operations and practices of licensed independent ocean freight forwarders.", and that he was "not associated in any way with a shipper, consignee, purchaser, or seller of shipments to foreign countries." In addition, that "After being licensed I do not intend to engage in any business other than ocean freight forwarding."

The license under consideration in this proceeding was issued January 27, 1966, and Mr. Hernandez R. did not become an employee of CCC until April 7, 1969. He did not report his employment to the Commission although he did amend his application information to show a change in address. Respondent therefore asserts that his statements were true when made and hence cannot be construed as such falsification which would support and warrant revocation of the license. Further, he argues, "There is a clear distinction between being 'engaged in business' and being 'employed.' " It is respondent's position that "there is no relationship between his functioning as an independent ocean freight forwarder and his employment at CCC."

Section 1 of the Shipping Act, 1916, states that:

> An "independent ocean freight forwarder" is a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest.

The language of the statute is clear and unambiguous. A licensed ocean freight forwarder must be independent. He cannot be one who is directly or indirectly controlled by a shipper. The Commission has consistently and unequivocally held that one who is employed by a shipper is not independent within the meaning and requirements of the statute and therefore cannot be licensed or continue to hold a license as a freight forwarder. See *License No. 790—North American Van Lines,* 14 F.M.C. 215 (1971). In *North American Van Lines* the Commission examined intensively and extensively the legislative history of Public Law 87–254, 87th Congress (section 44, Shipping Act, 1916, 46 U.S.C. 84lb, 75 Stat 522) which authorized the licensing of freight forwarders by the Federal Maritime Commission. It concluded that "All the legislative history points out clearly that exceptions to the clear and unambiguous language of the

statute were to be excluded and the inherent prohibition vis-a-vis control is absolute and we have so held in numerous proceedings." *Ibid.*, 221.

Nor can any weight be given to the proposition that the licensee having no shipper connection at the time of licensing has a right to its continuation when a subsequent connection is no more than being employed in a non-forwarding capacity by a shipper. The Commission in *North American Van Lines* squarely ruled that "It is immaterial that such control arises after a license is issued rather than prior to the application therefor. . . . Shipper control negates the Commission's authority not only to issue a license in the first instance, but to allow it to continue, regardless of any condition that the licensee may propose." *Ibid.*, 222.

Congress has explicitly removed discretion from the Commission when shipper connection is found, so the requirement of independence cannot be applied liberally. *Speed Freight, Inc.*, 14 F.M.C. 1, 9. The Commission is precluded from issuing a license unless it affirmatively finds that the applicant is or will be an independent ocean freight forwarder. *Frt. Fwd. Lic—Louis Applebaum*, 8 F.M.C. 306. Whenever a shipper connection is found to exist, that relationship alone is sufficient to revoke a license, notwithstanding any other merits or demerits of the particular forwarder involved. *Speed Freight, Inc., supra.*

"There is no provision in Public Law 87–254 exempting from the ban on licensing shipper-controlled forwarders who do not forward shipments for their shipper employer. . . ." *Application for Freight Forwarding License*, 9, F.M.C. 72, 75 (1965).

It is clear that the Congress intended to eliminate the evil of potential abuse. Although the situation of Mr. Hernandez appears to be more remote than the shipper-connection found in some other cases, an important public policy denies an independent forwarder the right to remain employed by an exporter, regardless of the degree or increments of "connection." That is why the Commission has rigidly adhered to the statutory prohibition. In this case there can be no contrary holding.

In addition to the statutory prohibition, there are other cogent reasons for revoking the license of Pan-Inter.

When applying for a license Mr. Hernandez advised the Commission:

> I am financially fit to qualify for a license because I am solvent and have sufficient funds to engage in the business of ocean freight forwarding. It is to be noted that no large sums are required by way of investment or outlays since shippers or others interested advance freight charges and other expenses enabling me to operate without large cash reserves. I do have available sufficient cash funds to operate adequately."

The Commission in *Dixie Forwarding Co., Inc., Application for License*, 8 F.M.C. 109, 118 (1964), synthesized the issue which this proceeding presents when it said:

> The business integrity of one who occupies the position of freight forwarder should be above reproach, and he should clearly demonstrate a complete awareness of and a willingness to accept the responsibilities that the preferred position imposes. Graves has shown an almost total lack of both. As the House Committee on Merchant Marine and

Fisheries pointed out: "The intention of the * * * licensing provision [section 44] is to have every person, firm or corporation who holds himself out as a forwarder to be fully competent and qualified to act in the fiduciary relationship which such business necessitates." Thus the philosophy of section 44 is such that the shipping public should be entitled to rely upon the responsibility and integrity as well as the technical ability of a freight forwarder. The record here, however, demonstrates that members of the shipping public who do business with Graves do so at their own risk. We cannot conscientiously license such an applicant and thereby suggest to the shipping community that we have probed his conduct and found him "fully competent and qualified" to act in a fiduciary capacity.

In the language of *Dixie Forwarding*, "The record here . . . demonstrates that members of the shipping public who do business with [Hernandez] do so at their own risk. [The Commission] cannot conscientiously [continue to] license such [as he] and thereby suggest to the shipping community that [it] has probed his conduct and found him "fully competent and qualified" to [continue to] act in a fiduciary capacity."

The Brizel Leather Company provides a clear example of the business practices of Mr. Hernandez.

It is an undisputed fact that Mr. Hernandez failed to remit money owing to a shipper and entrusted to him by a consignee, until more than five months after it was due and owing. That he ultimately paid the account is only to say that he did no more than that which was required and then only when placed under pressure to do so.

As a single incident and standing alone, it might be viewed as mere oversight. A falling through the crack so to speak. However, other relevant facts as revealed by the evidence of this proceeding demonstrates a course of conduct of a different kind.

It is not reasonable to believe that the failure to remit was "pure oversight" and that the oversight was not discovered until inquiry by Brizel in November 1974, or that Cleto Hernandez R. was unaware that the total received was substantially in excess of the amount to be retained by Pan-Inter.

It is more reasonable to believe that Cleto Hernandez R. had knowledge of the $4,475 owing to Brizel Leather Company from the time when it was received, until finally repaid. The evidence to support such a conclusion is that the deposit of $4,783.83 was the second largest amount of money placed into the Pan-Inter account during the year 1974; Cleto Hernandez R. checked the monthly balances between June and November; Pan-Inter only had 23 shipments during 1974 and would normally not prepay any ocean freight for a customer if the amount was more than 2 or 3 thousand dollars since it did not have the resources to do so; analysis of account #10–054–715 at the time of the deposit of the Brizel funds on June 19, 1974, reveals that the balance therein was only $561.06. With the deposit the balance was $5,344.89; thereafter the balance in that account steadily declined to $1,815.80 until August 7, 1974, when a credit memo of $2,105.21 increased the balance to $3,578.05 whereupon the balance

again steadily declined to a low of $37.64 on October 17, 1974, and rising to a high of $1,252.29 on November 27, 1974.

It is thus apparent the licensee did not between the time of receipt of the Brizel funds in June and the inquiry by Brizel in November have sufficient funds to remit the monies licensee received by it for the account of Brizel. The evidence is overwhelming that the funds were used primarily for Mr. Hernandez's personal requirements.

The failure of licensee to pay Sea-Land for ocean freight is another case of licensee's inability to properly carry out its duties and obligations as a freight forwarder.

The phrase "fit, willing, and able properly to carry on the business of forwarding" as set forth in section 44(b) of the Shipping Act, 1916, means that a forwarder is unfit and unable to perform his duties when he uses funds entrusted to him for uses not so intended or fails to pay bills incurred in connection with his freight forwarding activities. *Aetna Forwarding Co. Inc.—Revocation of License,* 8 F.M.C. 545, 551 (1965).

These standards pertain not only to complete independence, the ability to pay bills, and properly use funds entrusted to him by others, but it also means that a forwarder must act with the highest degree of business responsibility and integrity. *License Application—Guy G. Sorrentino,* 15 F.M.C. 130, 134 (1972).

The financial irresponsibility revealed by the record in this proceeding is incompatible with the fiduciary relationship which such business necessitates.

Under any of the standards applicable to the requirements of "fit, willing and able" to be licensed as an independent ocean freight forwarder Mr. Hernandez must be deemed to have failed.

CONCLUSIONS

For the reasons stated hereinabove, the Independent Ocean Freight Forwarder Licensee, Cleto Hernandez R., d/b/a Pan-Inter, is found to be in violation of section 44(b) of the Shipping Act, 1916 (46 USC 801 and 841(b)) and of sections 510.23(f) and (k) of General Order 4, and that he does not continue to qualify for a license as an independent ocean freight forwarder pursuant to sections 1 and 44(b) of the Shipping Act, 1916, and sections 510.2(a) and 510.9(d) of General Order 4.

ORDERED: License No. FMC–1108 is revoked pursuant to section 44(d) of the Shipping Act, 1916 (46 USC 841(b)) and sections 510.9(a), (d) and (e) of the Commission's General Order 4.

(S) STANLEY M. LEVY,
Administrative Law Judge.

WASHINGTON, D.C.,
February 10, 1976.

FEDERAL MARITIME COMMISSION

DOCKET NO. 73–54

WINDJAMMER CRUISES, INC. AND WINDJAMMER CRUISES LTD.

ADOPTION OF INITIAL DECISION

March 30, 1976

This proceeding was instituted to determine whether Windjammer Cruises, Inc. (Windjammer) violated sections 2 and 3 of Public Law 89–777 by embarking passengers on the *Flying Cloud* and the *Yankee Trader* at U.S. ports, and arranging, offering, advertising or providing passage on those vessels, without having first complied with the financial responsibility requirements of that statute.

In his Initial Decision, Administrative Law Judge Seymour Glanzer concluded that while Windjammer had violated section 3 of Public Law 89–777 and section 540.3 of the Commission's implementing regulations (46 C.F.R. 540.3), in arranging and providing passage on the *Flying Cloud* for persons embarking at Mayaquez, Puerto Rico, without having complied with the financial responsibility requirements, there was not proven any violation of section 2 of Public Law 89–777, since Windjammer was neither the owner or charterer of the vessels involved.

No exceptions were filed to the Initial Decision. Upon review of the entire record, we conclude that the Administrative Law Judge's finding and conclusions were proper and well founded. Accordingly, we hereby adopt the Initial Decision (a copy of which is attached) and make it a part hereof.

One collateral matter raised in the Initial Decision requires additional discussion. In the ordering portion of his recommended decision, Judge Glanzer referred to the Commission "for appropriate action" the matter of the conduct of Mr. Tarantino, counsel for Windjammer, during the course of the proceeding. Upon careful consideration of the matter, we find that the facts of record relating to Mr. Tarantino's behavior in the proceeding below, do not warrant or necessitate any type of disciplinary action or admonishment.

Nevertheless, we should like to take this opportunity to state that this Commission expects attorneys and other persons practicing before us to observe the same code of conduct and standard of diligence as would be

required of them in a court of law. The Commission's quasi-judicial character must be recognized and respected not solely for its own sake but more importantly to assure that the basic procedural and substantive rights of party-litigants be properly protected and represented.

By the Commission.

Attachment

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 73-54

WINDJAMMER CRUISES, INC.
AND
WINDJAMMER CRUISES, LTD.

Adopted March 30, 1976

Respondent found to have violated Section 3 of Public Law 89-777, 46 U.S.C. § 817e and General Order 20, 46 CFR § 540.3.

Investigations of violations of Section 2 of Public Law 89-777, 46 U.S.C. § 817d and General Order 20, 46 CFR § 540.22, dismissed.

Arthur E. Tarantino and *David Goldman* for respondents.[1]

Donald J. Brunner for Hearing Counsel.

INITIAL DECISION OF SEYMOUR GLANZER, ADMINISTRATIVE LAW JUDGE[2]

By Order of Investigation and Hearing issued August 24, 1973, the Federal Maritime Commission initiated this proceeding to determine whether Windjammer Cruises, Inc. and/or Windjammer Cruises Ltd. doing business as "Windjammer Cruises" violated—

1. Section 2, Public Law 89-777, by embarking passengers, or having embarked passengers, at United States ports without having complied with the financial responsibility requirements of Section 2 of Public Law 89-777, and/or

2. Section 3, Public Law 89-777, by arranging, offering, advertising or providing passage, or having arranged, offered, advertised or provided passage on a vessel without having complied with the financial responsibility requirements of Section 3 of Public Law 89-777, and/or

3. Sections 540.3 and/or 540.22 Federal Maritime Commission General Order 20 (46 C.F.R. 540.3 and 540.22) promulgated to implement Sections 2 and 3 of Public Law 89-777.—

by embarking passengers on the *Flying Cloud* at Mayaguez, Puerto Rico on or about December 18, 1972, and by embarking a passenger on the *Yankee Trader* at Miami Beach, Florida on or about February 16, 1973.

The hearing was held April 17, 1975, at Miami, Florida.

[1] Mr. Goldman appeared at the hearing. His request to withdraw as counsel for respondents was granted by order of June 30, 1975.

[2] This decision became the decision of the Commission March 30, 1976.

Legislative Background to Public Law 89–777[3]

In 1966, in the light of then recent incidents involving either cancellation of scheduled cruises, with passengers being left at the pier without recourse to recover their passage money which had been paid in advance, or accidents at sea in which death and injury resulted to passengers, coupled with a significant and substantial increase in the burgeoning ocean cruise business, the Congress saw fit to enact legislation which, among other things, was designed to accomplish the dual purpose of preventing financial loss and hardship to the American traveling public, who, after payment of cruise passage money, became stranded by the abandonment or cancellation of a cruise, and of providing assurance of financial responsibility to pay judgments for personal injury or death to passengers.[4]

Public Law 89–777 and Implementing Regulations

As pertinent, Section 2 of the Act[5] provides:

(a) Each owner or charterer of an American or foreign vessel having berth or stateroom accommodations for fifty or more passengers, and embarking passengers at United States ports shall establish under regulations prescribed by the Federal Maritime Commission, his financial responsibility to meet any liability he may incur for death or injury to passengers or other persons on voyages to or from United States ports. . . .

(d) The Federal Maritime Commission is authorized to prescribe such regulations as may be necessary to carry out the provisions of this section. The provisions of the Shipping Act, 1916, shall apply to proceedings conducted by the Commission under this section.

The applicable provisions of Section 3 of the Act[6] are:

(a) No person in the United States shall arrange, offer, advertise or provide passage on a vessel having berth or stateroom accommodations for fifty or more passengers and which is to embark passengers at United States ports without there first having been filed with the Federal Maritime Commission such information as the Commission may deem necessary to establish the financial responsibility of the person arranging, offering, advertising, or providing such transportation, or in lieu thereof a copy of a bond or other security, in such form as the Commission, by rule or regulation, may require and accept, for indemnification of passengers for nonperformance of the transportation.

(d) The Federal Maritime Commission is authorized to prescribe such regulations as may be necessary to carry out the provisions of this section. The provisions of this chapter shall apply with respect to proceedings conducted by the Commission under this section.

Pursuant to the authorization of Sections 2 and 3 of Public Law 89–777, the Commission promulgated regulations in General Order 20[7] to carry out the regulatory scheme contemplated by the Congress. The provisions of those regulations cited in the Commission's Order of Investigation and

[3] 80 Stat. 1356, 1357.
[4] H.R. Rep. No. 1089, 89th Cong., 1st Sess. 2–3 (1965).
[5] 46 U.S.C. § 817(d).
[6] 46 U.S.C. § 817(e).
[7] 32 F.R. 3987, Mar. 11, 1967; 46 CFR Part 540.

Hearing are 46 CFR § 540.3 and § 540.22. Section 540.3, which appears in Subpart A of Part 540, provides:

No person in the United States may arrange, offer, advertise, or provide passage on a vessel unless a Certificate (Performance) has been issued to or covers such person.

Section 540.22, which appears in Subpart B of Part 540, provides:

No vessel shall embark passengers unless a Certificate (Casualty) has been issued to or covers the owner or charterer of such vessel.

The definitions of the words and terms used in § 540.3 and § 540.22 appear in the applicable portions of Subparts A & B, but, for the reasons discussed below, only the definitions in Subpart A[8] shall be referred to. Those and other pertinent definitions are as follows:

(a) "Person" includes individuals, corporations, partnerships, associations, and other legal entities existing under or authorized by the laws of the United States or any State thereof or the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands or any territory or possession of the United States, or the laws of any foreign country.

(b) "Vessel" means any commercial vessel having berth or stateroom accommodations for 50 or more passengers and embarking passengers at U.S. ports.

(d) "United States" includes the Commonwealth of Puerto Rico, the Virgin Islands or any territory or possession of the United States.

(e) "Berth or stateroom accommodations" or "passenger accommodations" includes all temporary and all permanent passenger sleeping facilities.

(f)"Certificate (Performance)" means a Certificate of Financial Responsibility for Indemnification of Passengers for Nonperformance of Transportation issued pursuant to this subpart.

(g) "Passenger" means any person who is to embark on a vessel at any U.S. port and who has paid any amount for a ticket contract entitling him to water transportation.

Preliminary Matters

This proceeding was originally assigned for hearing and initial decision to Administrative Law Judge John Marshall, who participated in all prehearing matters and by Notice issued March 12, 1975, set the matter for hearing in Miami on April 17, 1975. Judge Marshall was unable to attend the hearing and I was substituted as presiding Judge. On April 30, 1975, the proceeding was reassigned to me for all purposes.

Pertinent Pre-Hearing Matters

Prior to the hearing, Hearing Counsel served a Request for Admissions[9] upon Arthur E. Tarantino, who had entered his appearance as attorney for respondent, Windjammer Cruises, Inc. on August 28, 1973. Among other things, Hearing Counsel sought to ascertain the truth of the following items:

1. That the *Yankee Trader* is a vessel operated by Windjammer Cruises, Inc., a

[8] 46 CFR § 540.2.
[9] Exhibit 1.

Florida corporation, P. O. Box 120, Miami Beach, Florida 33139/Windjammer Cruises Ltd., a subsidiary of Windjammer International Corp., Nassau, Bahamas (WCI/WCL).

2. That the *Yankee Trader* has berth or stateroom accommodations, which include all temporary and all permanent passenger sleeping facilities, for more than fifty (50) persons.

7. That the vessel *Flying Cloud* . . . is operated by WCI/WCL.

8. That the *Flying Cloud* has berth or stateroom accommodations, which includes all temporary and all permanent passenger sleeping facilities, for more than fifty (50) persons.

10. That on or about December 18, 1972, the following passengers boarded the *Flying Cloud* at Mayaguez, Puerto Rico and were thence transported thereon to the waters of the Dominican Republic, where the *Flying Cloud* became encumbered upon an unidentified submerged object or growth, or was otherwise rendered inoperative: (Please answer the following individually):

[There followed a list of 29 individual names.]

11. That WCI/WCL advertises various cruises in the United States.

12. That none of the vessels chartered, owned, and/or operated by WCI/WCL holds certificates issued by the Federal Maritime Commission under its General Order 20 (46 C.F.R. § 540). . . .

Accompanied by a Certificate of Service, signed by Mr. Tarantino and dated October 30, 1973, respondent's Reply To Request For Admissions[10] was submitted. That document was signed by Mr. Tarantino as attorney for respondent, and subscribed and sworn to by Mr. Tarantino before a Notary Public for the District of Columbia on October 29, 1973. Later, there was submitted a Certificate of Respondent's Reply To Request For Admissions[11], signed by Captain Mike Burke, president of respondent, and stating that he carefully read the Respondent's Reply To Request For Admissions and that the admissions and statements made therein were true. This Certificate was subscribed and sworn to before a Notary Public in and for Dade County, Florida on December 7, 1973.

The following answers to the above numbered items of the Request for Admissions were made in the Respondent's Reply:

1. True.
2. True.
7. True.
8. True.
10. True. [There followed a lengthy explanation of details]
11. Not accurate. [Additional information was supplied]
12. True. [Again, a lengthy explanation was furnished]

Respondent's Reply to Request for Admissions concluded with the suggestion, "In view of the admissions made and evidence presented . . . no hearing would appear necessary." Hearing Counsel countered this proposal by moving for a hearing. Over respondent's objection, Judge Marshall noticed the matters for hearing at Washington, D.C. However, at respondent's counsel's request, Judge Marshall rescheduled and relocated the hearing for Miami. The administrative record discloses that this came about after Hearing Counsel indicated its intention to examine

[10] Exhibit 2.
[11] Exhibit 3.

Captain Burke as its witness[12] and respondent's counsel renewed an earlier request for a site and time convenient to officers and employees of respondent.[13]

The Hearing—Procedural Matters

Ordinarily, it is unnecessary to recount the procedural progression of events which occur at a hearing. Here, however, because of the apparent disdainful attitude to the processes of this Commission displayed by respondent and Mr. Tarantino, it would be inappropriate to omit reference thereto.

The hearing was called for 10:00 a.m., April 17, 1975. Present at that hour were Hearing Counsel and the official reporter.[14] While Hearing Counsel, under instructions from me, was telephoning to determine why respondent had not appeared at 10:00 a.m., a gentleman entered and identified himself as Chuck Werner with Windjammer Cruises.[15] Mr. Werner stated that Mr. Tarantino would not attend the hearing, adding that he was under the impression that Mr. Tarantino had already informed me of his reasons for not being present.[16] About 10:30 a.m., when Hearing Counsel returned to the hearing room, the hearing was opened.[17]

From statements made by Mr. Werner, not under oath, several other things became evident. Mr. Werner was not an official of respondent and was not authorized by respondent or Mr. Tarantino to appear generally or to testify.[18] He was there simply to present a paper containing suggested findings and conclusions prepared by Mr. Tarantino.[19] Captain Burke, who knew that the hearing was taking place, would not attend.[20]

Mr. Werner also stated that it was he who worked closely with Mr. Tarantino in the preparation of the admissions that were adopted by Captain Burke,[21], but I would not permit him to take the stand to testify because he was not represented by counsel. Although this protection is not necessarily to be accorded a witness under subpoena, in the circumstances of an investigation into possible violation of law, I was concerned about the fairness of compelling this witness to testify without allowing him time for discussion with or representation by a legal advisor.[22] Before recessing, at 10:50 a.m., a subpoena was issued, ordering the attendance of Captain Burke at 2:00 p.m. that day.

During the recess that ensued, I spoke to Mr. Tarantino by telephone. Among other things, he informed me that the day before the hearing he

[12] Letter, dated March 3, 1975, from Hearing Counsel to Judge Marshall.
[13] Respondent's Reply to Hearing Counsel's Motion for Hearing, dated February 14, 1975, and respondent's counsel's letter dated March 12, 1975, to Judge Marshall.
[14] Transcript, hereafter Tr., p. 3.
[15] Id.
[16] Id.
[17] Tr. p. 4.
[18] Tr. pp. 6, 9, 10.
[19] Tr. pp. 5, 9, 13, 18.
[20] Tr. pp. 6-7.
[21] Tr. pp. 8, 16.
[22] Tr. p. 16

telephoned the Chief Judge to explain that he would not attend the hearing but that a local attorney would appear to represent respondent. He also told me that, by letter of April 11th, he gave some instructions to respondent, advising that an appearance be made at the hearing and that if the client acted in accordance with his letter it might not be necessary to have any counsel appear. I advised Mr. Tarantino that, if either Mr. Werner or Captain Burke appeared at 2:00 p.m. and he wished either or both to testify and be cross-examined in accordance with his letter's instructions, I wanted a telegram from him to that effect, unless, of course, they were accompanied by counsel to represent them at 2:00 p.m.[23]

The subpoena was not served, but, at 2:00 p.m., Captain Burke appeared with local counsel, David Goldman, and voluntarily took the stand. He was the only witness to be called during the proceeding.

Testimony of Captain Burke

Against the background of Respondent's Reply to Request for Admissions, admitting some but denying other facts necessary for a determination of the issues under investigation,[24] together with respondent's oft asserted belief that no hearing would be necessary because of such Reply,[25] Hearing Counsel proceeded to examine Captain Burke.

Captain Burke admitted that the signature which appears on the Certification of Respondent's Reply to Request for Admissions is his signature.[26] But he had no recollection of having seen that document or the underlying document to which it pertains, i.e.—Respondent's Reply to Request for Admissions.[27]

Thereupon, Captain Burke recanted two critical admissions concerning operation of the vessels *Flying Cloud* and *Yankee Trader* which, previously, both he and Mr. Tarantino had sworn were true. In response to questions posed by Hearing Counsel, Captain Burke stated that Admissions Nos. 1 and 7 are and were not true.[28] It will be recalled that Respondent's Reply to Request for Admissions unequivocally stated that *Flying Cloud* and *Yankee Trader* are vessels operated by Windjammer Cruises, Inc./Windjammer Cruises, Ltd. He testified that *Yankee Trader*

[23] Tr. pp. 19–20; At. 11:02 a.m., April 17, Mr. Tarantino sent the following Mailgram to me: "Re Docket NO. 73–54. Unfortunately I cannot attend hearing have a slipped disc. Mr. Werner, respondents operations assistant fully qualified to appear respond to questions and present statement on behalf of respondent. Advised Chief Judge John Cosgrove [sic] Wednesday April 16 regrets"

[24] The investigation was initiated pursuant to Section 22 of the Shipping Act, 1916, 46 U.S.C. § 821, as well as Sections 2 and 3 of Public Law 89–777. The second paragraph of Section 22 empowers the Commission on its own motion to investigate any violation of the Shipping Act, 1916. The second sentence of both Sections 2(d) and 3(d) expressly authorizes the use of all the provisions of the Shipping Act, 1916, including the investigative powers of Section 22, "with respect to proceedings conducted by the Commission under this section."

[25] Prehearing Conference, October 5, 1973, Tr. p. 3; Motion for Determination of Findings, served January 28, 1975; Respondent's Reply to Hearing Counsel's Motion for Hearing, served February 14, 1975; see also, Tr. pp. 5, 18.

[26] Tr. p. 33.

[27] Id.

[28] Tr. pp. 69–70, 76.

was owned and operated by a Panamanian Company named Hydrographer and that *Flying Cloud* was owned and operated by another Panamanian company—Flying Cloud S.A.[29] In response to my question, asking him if he had told Mr. Tarantino to tell Hearing Counsel that Windjammer Cruises, either Inc. or Ltd., operated vessels during 1972 through the first half of 1973, he answered "I don't remember."[30]

Captain Burke attempted to explain away his Certification of the admissions by stating that he is frequently away from the office, that he delegates duties to others who prepare documents for him which he does not always read but which he discusses and signs.[31] Although the Certification states that he "carefully read" the admissions, and albeit he did not explicitly testify that he had not read the admissions, it may be concluded that he wished the inference to be drawn that he had not read the underlying document at the time of certification. Needless to say, this explanation neither mitigates nor justifies Captain Burke's egregious conduct, rather it shows a supercilious disregard for his obligation under law.

In furtherance of the showing that Windjammer Cruises, Inc.[32] did not own, operate or charter any vessel during the time period under investigation, Captain Burke testified that this entity is a booking and travel agent licensed under the laws of Florida.[33] In that role, Windjammer Cruises, Inc. entered into a written agency agreement with Flying Cloud S.A.[34] whereby it agrees to "do all things necessary in order to sell tickets for cruises on the vessel, *S/V Flying Cloud;* that it shall advertise and in all manner exploit said cruises; that it shall provide office personnel and machinery for the sales of such cruise tickets."[35] In consideration of this undertaking, Windjammer Cruises, Inc. is to receive twenty (20) percent of the gross sales of all tickets sold for cruises on the *Flying Cloud* by Windjammer Cruises, Inc. or its authorized sub agents.[36] Windjammer Cruises, Inc. does advertise the availability of cruises on the *Flying Cloud* and, upon request, makes available brochures concerning such cruises.[37] Upon receipt of a deposit, Windjammer Cruises, Inc. issues a ticket, which, on its face, shows that the issuer is the booking agent for the *Flying Cloud*.[38]

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[29] Tr. pp. 40–41.

[30] Tr. pp. 100–101. But, see Prehearing Conference Tr. at p. 3 wherein Mr. Tarantino stated, "Now, I have studied the operation, and I have seen some of the advertising, and I am fully acquainted with it, and I am acquainted with Captain Burk's [sic] operation . . .," also Motion For Determination of Findings at p. 1, stating, "In support of this motion, Respondent advises that on *October 29, 1973*, it had submitted in response to Hearing Counsel's Request for Admissions sufficient, clear, unequivocal replies supported by the best available documented evidence wherein it 1. Admitted that Respondent had embarked passengers on the *Flying Cloud* . . ."

[31] Tr. pp. 33, 99–100.

[32] Windjammer Cruises, Ltd., a corporation chartered in Nassau, Bahamas about 1960, became defunct about the beginning of 1972 and performed no business functions during the time period under investigation. Tr. p. 36.

[33] Tr. p. 36.

[34] Tr. p. 51–52.

[35] Exhibit 8.

[36] Id. Cf., testimony of Captain Burke in which he stated the commission to be fifteen (15) percent. Tr. p. 50.

[37] Tr. p. 59; Exhibit 2, Attachments A, B and C.

[38] Tr. p. 58–59; Exhibit 9.

In all material respects, the relationship between Windjammer Cruises, Inc. and Hydrographer, owner and operator of *Yankee Trader*, is substantially identical to the agency relationship between Windjammer Cruises, Inc. and Flying Cloud S.A.[39]

Both *Flying Cloud* and *Yankee Trader* have berth and stateroom accommodations, which includes all temporary and all permanent passenger sleeping facilities, for more than fifty (50) persons.[40] Neither vessel holds a certificate issued by the Federal Maritime Commission under General Order 20 and from this fact it may be inferred that there was not filed with the Commission information necessary to establish financial responsibility or other security in lieu thereof for indemnification of passengers for nonperformance of transportation.[41]

The *Flying Cloud* and *Yankee Trader* do not schedule calls at United States ports to embark passengers. Windjammer Cruises, Inc. does not advertise that the cruises will embark passengers at United States ports.[42]

On one occasion, on or about February 16, 1973, *Yankee Trader* put into Miami, Florida, where a person named Patricia Adams was boarded on the vessel. Hearing Counsel contended she was a passenger. Captain Burke testified she was a member of the crew.[43] The *Yankee Trader* left Miami on a shakedown cruise with Ms. Adams aboard. The vessel, with Ms. Adams continued to Freeport where the passengers for the particular cruise were embarked.[44] The evidence adduced concerning her status—whether as passenger or crew member—falls on both sides of the fence. But, in view of uncontradicted testimony by Captain Burke that "[s]he had an obligation to perform certain duties aboard ship,"[45] it must be concluded that Hearing Counsel did not sustain its burden of persuasion that she was a passenger. In any event, Hearing Counsel has abandoned the allegation of the Order of Investigation and Hearing concerning the *Yankee Trader*.[46]

The incident involving the *Flying Cloud* presents a different picture. On the way to Roadtown Tortola, British Virgin Islands, to embark passengers for a cruise, that vessel became disabled and put into Mayaguez, Puerto Rico, for repairs.[47] Some of the passengers had already assembled at Tortola, others—admittedly, 29, and perhaps as many as 50—were at San Juan, Puerto Rico, ready to emplane to meet the vessel at Tortola.[48] The San Juan group became irate at the delay. Captain Burke, in his capacity as president of Windjammer Cruises, Inc., found it

[39] Tr. p. 49; Exhibits 6, 9.
[40] Tr. pp. 70-71, 76-77; Exhibits 1, 2, items 2 and 8; Exhibit 2, Attachment B.
[41] 46 CFR Part 540; Tr. p. 84; Exhibits 1, 2, item 12; in addition, official notice is taken that an examination of the Commission's records would reveal that no such information or security was filed with the Commission and that no such Certificate was issued.
[42] Tr. 84-85, 151; Exhibit 2, item 11 and Attachments A, B and C.
[43] Tr. pp. 115-136, 154-156.
[44] Tr. p. 155.
[45] Tr. p. 154.
[46] Opening Brief of Hearing Counsel, p. 2.
[47] Exhibit 2; Tr. pp. 78-80.
[48] Id; Tr. pp. 140-142, 152-154.

expedient to send the latter group to Mayaguez and, at the same time, direct the captain of the *Flying Cloud* to embark the passengers there. The vessel's captain accepted this direction because it was the usual procedure to board passengers at Captain Burke's command.[49] After embarking the passengers at Mayaguez on December 18, 1972, the *Flying Cloud* departed on its cruise, but ran aground off the coast of the Dominican Republic. The latter occurrence caused premature termination of the cruise.[50]

Captain Burke stresses that the act of embarking passengers at Mayaguez was for the convenience of the passengers and not that of the owners.[51] This may well be. But it is inescapable that Captain Burke also acted in self interest. Windjammer Cruises, Inc.'s commissions were dependent upon the cruise taking place. If the prospective passengers had eschewed the cruise in dissatisfaction over the events, the commissions already received would have to be returned and the commissions otherwise due it from Flying Cloud S.A. would become null and void.[52]

Discussion and Conclusions

In view of the foregoing, all of which constitute my findings of fact as well as some conclusions, the following additional conclusions are drawn.

Inasmuch as neither respondent, Windjammer Cruises, Inc. nor Windjammer Cruises, Ltd., was the owner, operator or charterer of any of the vessels named in the Order of Investigation and Hearing during the period covered by such order, the provisions of Section 2 of Public Law 89–777 and 46 CFR § 540.22 can have no application to respondent's activities in this investigation. Further, the preponderance of the evidence indicates it was reasonable to believe that Ms. Adams was a member of the crew of the *Yankee Trader* when she boarded that vessel at Miami on or about February 16, 1973. Thus, insofar as that matter is involved in this inquiry, I find that there was no violation, by either respondent, of Section 3 of Public Law 89–777 or of 46 CFR § 540.3.

In boarding passengers for a cruise on the *Flying Cloud* at Mayaguez, Puerto Rico on December 18, 1972, Windjammer Cruises, Inc., violated both Section 3 of Public Law 89–777 and 46 CFR § 540.3, in that it did, in the United States, arrange, offer, provide and sell passage to 29 passengers on a vessel, having berth or stateroom accommodations for fifty or more passengers, embarking passengers at a United States port, without there first having been filed with the Commission such information as the Commission deemed necessary to establish the financial responsibility of Windjammer Cruises, Inc. or other security for indemnification of passengers for nonperformance of transportation and without

[49] Id.
[50] Id.
[51] Tr. pp. 153–154.
[52] Tr. pp. 81–82.

there being in force and effect a Certificate (Performance) issued to or covering Windjammer Cruises, Inc.

In Respondent's Reply Brief, submitted and served by Mr. Tarantino, Windjammer Cruises, Inc. admits that the *Flying Cloud* did embark passengers at Mayaguez, but contends that because the plan of operation, sailing schedules and promotional literature for the cruises sold by respondent did not contemplate embarkation of passengers at United States ports, this isolated incident did not require the issuance of a Certificate under Public Law 89–777. Curiously, and most incredibly, in the light of Captain Burke's testimony and exhibits in support thereof, this Brief perpetuates the illusory representations, set forth in Respondent's Reply to Request for Admissions, that the respondent operated cruise vessels during the period under investigation.[53]

Respondent's position is unfounded. The law makes no exception for single occurrences, and this is as it should be if the cruise oriented public is to be given the effective protection which the sense of the Congress intended. Nothing in the legislative history or in the clear language of the statute would indicate that the Congress intended otherwise. The mandate is that before passage he arranged, offered, advertised or provided, that the person so doing shall *first* make the necessary filing required by the Commission to establish financial responsibility.[54] This requirement the respondent did not fulfill, although its president appears to have had actual knowledge of the existence of the statute going back to the time of its enactment.[55]

It is noted that the issuance of a cease and desist order is not explicitly required to be considered as appropriate remedial action in this proceeding under the terms of the Order of Investigation and Hearing. Hearing Counsel has not urged that a cease and desist order be entered. However, the proceeding was instituted under Section 22 of the Shipping Act, 1916, which specifies that the Commission may make such order as it deems proper. Assuming, but not deciding, that silence in that Order does not bar the issuance of a cease and desist order,[56] nevertheless, I find that the 30 proven violations of Section 3 of Public Law 89–777[57] were not of a continuing nature and there has been no showing that a practice of violation is likely to continue. Moreover, the evidence discloses voluntary cessation of the proscribed conduct, without compulsion of enforcement proceedings, at least eight months before the investigation was initiated. In these circumstances, a cease and desist order, a remedy traditionally fashioned to discontinue ongoing violations or to forestall future violations, would be unwarranted.

[53] Respondent's Reply Brief, pp. 2, 3. Although Captain Burke testified that the admissions erroneously showed that the cruise of the *Flying Cloud* was to commence at St. Johns, Antigua Island, whereas, in fact, it was to start at Tortola, the Brief continues to refer to St. Johns as the starting point.

[54] Wall Street Cruises, Inc., 15 F.M.C. 140, 142–143 (1972).

[55] Tr. 157, 159.

[56] But, cf. Attorney General's Manual on the Administrative Procedure Act 46 (1947).

[57] Under Section 3(d) of Public Law 89–777, 46 U.S.C. 817e(d), the act of violation itself is treated as a single offense and each passage sold constitutes a separate offense.

ORDER

1. The investigation of violations of Section 2, Public Law 89–777 alleged in the Order of Investigation and Hearing is dismissed.

2. The investigation of violations of 46 CFR § 540.22 alleged in the Order of Investigation and Hearing is dismissed.

3. The respondent, Windjammer Cruises, Inc. violated Section 3 of Public Law 89–777 and 46 CFR § 540.3 on December 18, 1972, in arranging, offering, providing and selling passage to 29 passengers who embarked on the *Flying Cloud* at Mayaguez, Puerto Rico, without having complied with the financial responsibility requirements of that statute and that regulation.

4. The matter of the conduct of Arthur E. Tarantino, an attorney at law engaged in practice before this Commission, is referred to the Commission for appropriate action.

(S) SEYMOUR GLANZER,
Administrative Law Judge.

WASHINGTON, D.C.,
March 8, 1976.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 337(I)

UNION CARBIDE INTER-AMERICA, INC.

v.

VENEZUELAN LINE
(COMPANIA ANONIMA VENEZOLANA DE NAVEGACION)

NOTICE OF DETERMINATION NOT TO REVIEW

April 13, 1976

Notice is hereby given that the Commission on April 13, 1976, determined not to review the decision of the Settlement Officer in this proceeding served April 7, 1976.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 337(I)

UNION CARBIDE INTER-AMERICA, INC.

v.

VENEZUELAN LINE
(COMPANIA ANONIMA VENEZOLANA DE NAVEGACION)

Reparation Awarded.

DECISION OF CAREY R. BRADY, SETTLEMENT OFFICER[1]

Complainant seeks reparation in the amount of $484.70 from respondent, claiming a freight overcharge on a shipment from Houston, Texas to Puerto Cabello, Venezuela carried aboard respondent's vessel MERIDA on February 28, 1974, pursuant to the terms of the United States Atlantic and Gulf Venezuela and Netherlands Antilles Conference Freight Tariff F.M.C. No. 2, S. B. Ven-11. The bill of lading and the export declaration both described the cargo shipped as "200 Drums, Vinyl Acetate Monomer" weighing 94,000 pounds and measuring 2,142 cubic feet. The shipment was rated as 2,142 cubic feet at $68.00 per 40 cubic feet which produced charges of $3,968.70 plus accessorial charges. Complainant maintains the shipment should have been rated on the basis of $68.00 per 2,000 pounds, the applicable rate for "Vinyl Acetate Monomer", class rate 7W.[2]

Respondent denied the claim solely on the provisions of Tariff Item No. 11 which requires that claims be filed within six months after the date of shipment. The Commission has ruled that a claim filed within two years from the date the cause of action arose must be considered on its merits.[3] The shipment moved on February 28, 1974, and the claim was filed with the carrier in February 1975 and with the Commission on November 11, 1975. The claim has been filed within the two year statutory limit and thus will be treated on the merits.

While the Commission has ruled that a rule similar to the one on which

[1] Both parties having consented to the informal procedure of Rule 19, 46 CFR 502.301–304 (as amended) this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.
[2] Tariff Item No. 1000, 15th Rev. Page 70 and Item No. 999, Group 1, 6th Rev. Page 68.
[3] Colgate Palmolive Company v. United Fruit Company, Informal Docket No. 115(I), 1970.

respondent is denying relief cannot be used to defeat a claim properly filed with the Commission, the complainant nevertheless has a heavy burden of proof once the shipment has left the custody of the carrier.[4]

Respondent does not challenge any of the contentions of the complainant, in fact, by letter dated December 11, 1975, respondent stated that the claim "filed by the complainant is found to be correct. Obviously, the bill of lading was rated in error and it is requested that a ruling in favor of the complainant be issued."

Item 999 of the tariff specifically provides a rate on Acetates, Vinyl, Monomer at Class 7 on weight with no provision made for assessment on a measurement basis. The bill of lading and supporting shipping documentation clearly show the cargo shipped to be Vinyl Acetate Monomer.

Complainant having met his burden of proof, reparation is awarded in the amount of $484.70, the difference between the charges assessed of $3,968.70 and the correct charges of $3,484.00 (94,000 lbs. at $68.00 per 2,000 lbs. plus accessorial charges).

(S) CAREY R. BRADY,
Settlement Officer.

[4] Ibid.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-52

CITIES SERVICE INTERNATIONAL, INC.

v.

THE LYKES BROS. STEAMSHIP CO., INC.

NOTICE OF ADOPTION OF INITIAL DECISION

April 22, 1976

No exceptions having been taken to the initial decision of the Presiding Judge in this proceeding, served March 31, 1976, and the Commission having determined not to review same, notice is hereby given that the decision became the decision of the Commission on April 22, 1976.

By the Commission.*

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

*Vice Chairman Morse's dissenting views attached.

FEDERAL MARITIME COMMISSION

No. 75-52

CITIES SERVICE INTERNATIONAL, INC.

v.

THE LYKES BROS. STEAMSHIP CO., INC.

Adopted April 22, 1976

Non-contract rates found inapplicable; reparation awarded on basis of contract rates.

Gerald E. Bone for the complainant.

David W. Gunther for the respondent.

INITIAL DECISION OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE[1]

The shortened procedure was followed. By complaint filed November 17, 1975, the complainant alleges that it was charged inapplicable non-contract (tariff) rates, rather than the applicable contract rates on certain shipments of aluminum stearate, oil well drilling compounds, and oil well cement, bill of lading dated August 19, 1974, from New Orleans, Louisiana to Matarani, Peru; also on certain shipments of steel pipe, oil well equipment, and auotmobile trucks, three bills of lading dated August 8, 1974, from Houston, Texas to Matarani; and also on a shipment of oil well equipment, bill of lading dated August 6, 1974, from Houston to Matarani. The complainant also alleges that it was charged the inapplicable non-contract (tariff) rate on a shipment of knocked-down steel tanks, rather than the applicable contract rate on iron or steel tank material, bill of lading dated August 5, 1974, from Houston to Matarani.

The respondent agrees that the total charges collected on all of the above shipments were $126,378.75, that the applicable charges totalled $106,074.30, and that the complainant was overcharged a total of $20,304.45.

The shipper and consignee of the above shipments, shown in the bills of lading as Peru-Cities Service, Inc., had not been listed as a fully-owned subsidiary of the complainant, Cities Service International, Inc., and

[1] This decision will become the decision of the Commission in the absence of exceptions thereto or review thereof by the Commission. Rule 13(g), Rules of Practice and Procedure, 46 CFR 502.227.

therefore the respondent did not charge the contract rate available to contract signers, such as the complainant. Furthermore, the bills of lading failed to contain the appropriate proprietary clauses. The complainant advised the respondent on July 28, 1975, that Peru-Cities Service, Inc. is a fully-owned subsididary, and that the cargo in issue was proprietary cargo. In view of the six-months claim rule in the conference's tariff the complainant was advised by the respondent to file the present complaint.

In addition to the overcharges of $20,304.45, the complainant asks reasonable interest for the interim period in which complainant alleges it has suffered loss of use of the overcharge funds. Such interest hereby is denied inasmuch as the complainant caused its own problem in this respect, by its failure to make the proper certifications regarding the proprietary nature of the cargo, whereas the respondent charged what it had to charge on the basis of the facts then known to the respondent.

It is concluded and found that the complainant was overcharged $20,304.45 and reparation in that amount is awarded. The respondent will make such payment to the complainant within thirty days.

(S) CHARLES E. MORGAN,
Administrative Law Judge.

WASHINGTON, D.C.,
March 31, 1976.

Vice Chairman Clarence Morse dissenting. I vote to review.

The Initial Decision is inaccurate as to the facts.

On prepaid bill of lading # 3, New Orleans/Matarani, dated August 18, 1974, the shipper and consignee is Peru-Cities Service, Inc. On the remaining prepaid bills of lading the shipper is Cities Service International, Inc., and the consignee is Peru-Cities Service, Inc.

None of the bills of lading contain the Industrial Contract proprietary use certification.

Cities Service International, Inc., is signatory to the Merchant's Freighting Agreement, but Peru-Cities Service, Inc., is not identified as a related company. Cities Service International, Inc., is signatory also to the Industrial Contract Rate Agreement.

Peru-Cities Service, Inc., is not signatory to either the Merchant's Freighting Agreement or the Industrial Contract Rate Agreement.

Hence, it would appear that under B/L # 3, identified above, the tariff rate would be the lawful rate because Peru-Cities Service, Inc., is neither (1) a signatory to either rate agreement (Merchant's Freighting Agreement or Industrial Contract Rate Agreement), nor (2) named as a related company on Cities Service International, Inc., Merchant's Freighting Agreement.

As to B/L # 3 discussed above, Cities Service International, Inc., violated its obligations under section 1(b) of its Merchant's Freighting

Agreement with the Atlantic & Gulf/West Coast of South America Conference applicable here. That section states that the merchant signatory "warrants and represents that the list [of related companies] is true and complete [and] that he will promptly notify the Carriers in writing of any future changes in the list . . ." Neither the shipper nor the Conference being permitted to alter the contract without Commission permission (see section 17 of the contract), both are bound by its terms as part of the Conference Tariff. Consequently, the contract rate may not be offered to or collected by a Conference member from a shipper not subject to the contract. Further, Peru-Cities Service, Inc., not being party to the Industrial Contract, rates under it are not applicable and omission of the proprietary use certification on the bill of lading is immaterial.

As to the remaining bills of lading, the only "fault" is the lack of the proprietary use certification. The Conference Tariff (at 7th Revised Page 218, effective April 1, 1974) provides that "All Bills of Lading *shall* be clausued" with proprietary use certification (emphasis added). To permit a subsequent refund based upon the shipper's failure to include that clause would be to permit the carrier to deviate from its tariff.

Reparations as claimed and as authorized by the Administrative Law Judge are, therefore, incorrect.

FEDERAL MARITIME COMMISSION

DOCKET NO. 74-31

INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION
LESCO PACKING CO., INC.

Application for freight forwarder license denied on grounds that applicant is unfit in view of long history of statutory and regulatory violations.

Perry Gary Fish for Applicant.

Donald J. Brunner and *C. Jonathan Benner* as Hearing Counsel.

REPORT

May 21, 1976

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett and James V. Day, *Commissioners.*)*

The Commission instituted this proceeding.to determine whether Lesco Packing Co., Inc. (Lesco), is fit to properly carry on the business of ocean freight forwarding and to conform to the provisions of section 44 of the Shipping Act, 1916 (46 U.S.C. 84lb), and whether its application for an independent ocean freight forwarder license (application) should be granted.

The Initial Decision of Administrative Law Judge William Beasley Harris (Presiding Officer) concluded that Lesco's license application should be denied. Exceptions to the Initial Decision were filed by both Hearing Counsel and Lesco and oral argument was heard by the Commission. Although we agree with and adopt the Presiding Officer's ultimate conclusion, we have, for the sake of both clarity and accuracy, found it necessary to issue our own findings and conclusions in support of this final result.

BACKGROUND AND FINDINGS OF FACT

Lesco is a New York corporation whose sole stockholder and chief executive officer since June 30, 1971, has heen Irving Betheil. Much of Lesco's present business is connected with export packing and handling

*Commissioner Bob Casey not participating.

air freight shipments.[1] During the 20 years prior to filing the instant application Mr. Betheil was involved in the following incidents:

(1) In 1959 Mr. Betheil and other principals of the Aristo Shipping Company, Inc., pleaded guilty in the U.S. District Court, Southern District of New York to a charge of conspiring to violate the Bills of Lading Act (49 U.S.C. 81–124). A sentence of a year and a day was imposed on Mr. Betheil and suspended.

(2) On June 9, 1964, the "grandfather rights" of S&C Forwarding Corp. (FMB Registration No. 1414) were revoked and the ocean freight forwarding application of International American Forwarding Corp. (IAFC) was denied on the grounds that Irving Betheil: (1) knowingly and willfully made false statements on IAFC's application for an independent ocean freight forwarder license in violation of 18 U.S.C. 1001; and (2) knowingly and willfully carried on the business of ocean freight forwarding by falsely obtaining grandfather rights during the period August 1962 through December 1962, in violation of section 44(a), Shipping Act, 1916 (46 U.S.C. 84lb). Irving Betheil was president and sole stockholder of S&C Forwarding Corp. at the time its "grandfather rights" were revoked. He was also president and 50 percent owner of International American Forwarding Corp. and managed its daily operations at the time its license application was denied.

(3) In 1964 the Department of Commerce denied export privileges to a concern of which Mr. Betheil was president. This denial was based on export control law violations arising out of the improper export of strategic electronics equipment and the false description of other commodities.

(4) Mr. Betheil was one of several parties to a formal Commission proceeding involving a licensed freight forwarder and an applicant for a freight forwarder license. The Commission found that the parties had engaged in a course of conduct during 1969 and 1970 which was intended to enable Mr. Betheil to engage in ocean freight forwarding without a license, in violation of section 44. The license of the freight forwarder was revoked and the applicant was denied a license. F.M.C. Docket No. 71–47, 16 F.M.C. 256 (1973).

The prehearing conference originally scheduled in connection with the instant proceeding was cancelled by the Presiding Officer at Lesco's request.[2] In lieu thereof, Lesco was directed to submit certain basic prehearing type information.[3] When Mr. Betheil failed to respond in the time prescribed, the Presiding Officer wrote Lesco specifically inquiring about its plans for legal representation. On October 17, 1974, a standard warning Notice was issued advising Lesco of the possible penalties for noncompliance. Lesco then replied by stating that its inaction was inadvertent and it would henceforth cooperate with the Commission's representatives. Lesco subsequently admitted as "true" Hearing Counsel's request for Admission of Facts and Genuiness of Documents which included a detailed statement describing the statutory and regulatory violations referred to above.

Mr. Betheil arrived 12 minutes late for the evidentiary hearing held in this proceeding, and then without either an attorney or any witnesses.[4]

[1] Lesco does not possess an air forwarder's license from the Civil Aeronautics Board.

[2] All of Lesco's transactions with the Commission were conducted by Mr. Betheil personally until March 4, 1975, when counsel filed a notice of appearance in the case. By this time the hearing had been completed. Lesco's motion for a new hearing based on the absence of counsel was denied by Order served June 20, 1975.

[3] This information included the name and address of Lesco's lawyer, the admission of facts and documents which would avoid unnecessary proof, the number of witnesses and their proposed testimony, the suggested date and place of hearing, and other matters designed to aid in the disposition of this proceeding.

[4] Lesco never replied to Hearing Counsel's request for the names and addressed of the witnesses it intended to call.

Later that morning, Lesco produced three character witnesses: (1) the operator of a messenger service who had known Mr. Betheil for a period of 12 to 15 years; (2) the secretary of Mr. Betheil's social lodge who had known him for 32 years; and (3) a lawyer who had known Mr. Betheil for about 20 years. All three witnesses testified favorably concerning Mr. Betheil's personal honesty and truthfulness, but were uninformed concerning his reputation in the business community, did not know others who had professional dealings with Mr. Betheil, and had only minor business contacts with Mr. Betheil themselves.[5]

Hearing Counsel conceded that Mr. Betheil possessed both the ability and willingness to perform as an independent ocean freight forwarder, but argued for denial of Lesco's license application because Mr. Betheil's past violations of law and administrative regulations represent a course of conduct which raise serious doubts as to his present fitness to operate as a licensed forwarder.

Mr. Betheil replied that his mistakes were things of the past, that he paid for his actions "over and over again" and has "changed his mode of life." He contended that a refusal to license Lesco would serve no purpose except to deprive Mr. Betheil of his livelihood because ocean freight forwarding is the only business he really knows.[6]

In denying Lesco's license application the Presiding Officer concluded that:

> 1. While the matter of past violations is germane to the question of fitness and is not singularly determinative thereof, they are evidence in the record of past law violations by the applicant which supports reasonable doubt about the applicant's good character and fitness for licensing as an independent ocean freight forwarder.
>
> 2. On the whole record a reasonable man could fairly find that there were substantial doubts about the applicant's good character, fitness, and respect for the rights of others and for the laws of the regulatory commissions and of the nation.
>
> 3. Under the circumstances of this case, the applicant has failed to meet his burden of proof as to his fitness properly to carry on the business of forwarding under section 44 of the Act. [Footnote omitted.]
>
> 4. The application should be denied.

Conclusions two through four were based not only on "the evidence of past law violations by applicant," and "doubts about Mr. Betheil's ability to avoid the sort of indiscretions which have plagued his operations for the past 16 years," but also on Lesco's disregard for what the Presiding

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[5] The Presiding Officer was unimpressed with Mr. Betheil's character witnesses in part because they testified only as to their personal knowledge of Mr. Betheil's character instead of discussing his general reputation in the ocean freight industry. Although the Initial Decision is phrased in language which could be criticized as overly technical under the circumstances, the record reveals that none of the witnesses offered convincing support for a finding of good character. Richard Cotogono testified that Mr. Betheil was always honest with him and that Mr. Betheil tries very hard to do a good job, but admitted that he had no knowledge of what others thought of Mr. Betheil's truthfulness or honesty. Murray Birnback testified that within Mr. Betheil's association with the Free Sons of Israel he was loyal, industrious and honest. Mr. Birnback had no business contracts with Mr. Betheil or the ocean freight forwarding industry in general. Jacob S. Schulman stated that Mr. Betheil enjoyed a generally good reputation for integrity and honesty, except for his 1959 conviction. However, Mr. Schulman also stated he was unaware that Mr. Betheil's firm was denied export privileges in 1964 or that the Commission found him to have operated as an unlicensed forwarder during 1969–1970.

[6] No evidence was introduced to support this assertion, nor is there reason to believe that an individual skilled in the business of forwarding cannot find employment in related segments of the ocean freight industry.

Officer characterized as the "necessary processes" and "necessary details in this proceeding."[7]

Discussion and Conclusions

Lesco had broadly excepted to "the holdings of the [Initial Decision] . . . denying a forwarding license to applicant and every part thereof," and taken four specific objections as well. The Applicant first argues that the Presiding Officer erred in holding that Mr. Betheil's inattentiveness to the necessary details of the instant proceeding is a factor determinative of his "fitness" to perform as a licensed ocean freight forwarder.[8] Lesco submits that is it unfair to compare "a freight forwarder who is expected to attend to all the necessary details of shipping, insuring and documenting of goods with an applicant for a freight forwarder's license proceeding pro-se" and conclude that because Mr. Betheil had trouble complying with proper hearing procedure, he would have similar difficulty performing the details attendant to freight forwarding services.[9]

Lesco also objects to the finding and conclusion that Mr. Betheil's past violations of law and Commission regulations demonstrate a lack of "fitness" to receive a forwarder's license. On the contrary, since Mr. Betheil has "fully admitted his past violations" and "did not seek to hide what was," Lesco claims the record "reflects a definite desire on the part of the applicant to change his past and the present existence of good character." It asserts that the record in this proceeding, considered in its entirety, favors "at least a time-limited license," especially since Mr. Betheil's prior illegal activities were of the type generally termed as "malum prohibitum" violations, and, except for the 1969–70 incident when Mr. Betheil operated as an unlicensed forwarder, occurred over eleven years ago.

Thirdly, Lesco contends that the burden of proof should be upon Hearing Counsel to prove Applicant's unworthiness, and, finally, that

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[7] The Presiding Officer reasoned that since a freight forwarder "is expected to attend to all the necessary details of shipping, insuring and documenting of goods," Mr. Betheil's inattentiveness to detail, as demonstrated by his conduct during this proceeding:

> . . . exposes a foible in the applicant's personal character or behavior and reflects on his ability to perform as a licensed independent ocean freight forwarder.
>
> Specific conduct found to reflect unfavorably on Lesco's ability to carry out the duties and responsibilities of an ocean freight forwarder were Mr. Betheil's failure to: (1) honor Hearing Counsel's request for the names and addresses of witnesses he intended to call; (2) timely respond, if at all, to "various" other queries; (3) arrive at the hearing at the appointed time and with his witnesses; and (4) generally acquaint himself with the Commission's Rules of Practice and Procedure and comply with the requirements thereof. For example, Mr. Betheil submitted only three copies of his reply brief to Hearing Counsel's opening brief instead of the 15 copies required by the Commission Rules.

[8] Lesco asserts that this is the "real" reason for the denial of the license, notwithstanding the discussion of past violations. Hearing Counsel join Lesco in excepting to the assessment of demerits for Lesco's inattention and mishandling of various aspects of the instant proceeding, but support the denial of Lesco's application based upon its past violations.

[9] Applicant further argues that: "Lack of knowledge as to the law governing 'reputation evidence,' the giving of testimony or the production of witnesses is neither material nor relevant to the issue of 'fitness' under that Act; the sole issue under consideration ('willingness' and 'ability' having been conceded). Legal ignorance in the trial of a matter is certainly unrelated to any past violations of law and in no way is supportive of [the Presiding Officer's] findings."

section 44 of the Shipping Act is unconstitutional to the extent it requires Mr. Betheil "to prove his fitness to a moral certainty." Only Lesco's first exception relating to Mr. Betheil's procedural irregularities can be sustained.

It is well established that the burden of proof in a licensing proceeding is on the applicant.[10] The plain language of section 44(b) indicates as much by providing that a forwarding license shall only issue if the Commission finds that the applicant meets the statutory criteria and that "*otherwise such application shall be denied.*" By applying for its initial federal license to operate an an independent ocean freight forwarder, Lesco requests a change in the status quo. The United States Court of Appeals has held that the burden of proof in administrative proceedings falls upon the person who is seeking to change the status quo, *Commonwealth of Puerto Rico v. Federal Maritime Commission,* 468 F.2d 872, 881 (D.C. Cir. 1972). Although the Bureau of Hearing Counsel had the burden of introducing evidence on the question of Lesco's fitness, the burden of proof on that question as well as whether a license should ultimately issue fell squarely upon Lesco. See *United Church of Christ v. Federal Communications Commission, supra.*

The Initial Decision held that Lesco did not meet this burden of proof. Lesco's failure to demonstrate its character qualifications, or "fitness" to operate as a freight forwarder must necessarily result in the denial of its license application pursuant to section 44. The statute does not require proof of fitness "to a moral certainty," and section 44 has never been so applied by the Commission.[11]

The record in this case contains evidence of poor character on the part of Lesco's sole stockholder and chief executive officer. There has been a pattern of irresponsible action reaching back to 1959, including violations of the Bills of Lading Act and section 44 of the Shipping Act, the most recent of which occurred in 1970. The only rebuttal offered by Lesco was: the passage of time, character testimony from three of Mr. Betheil's long-time friends and Mr. Betheil's own assertion that he had reformed. Like the Presiding Officer, the Commission is unpersuaded that this evidence sufficiently establishes that positive steps have been taken to assure against the repetition of such incidents.

A licensed forwarder must possess, read, understand and meticulously follow the Commission's regulations. A forwarder must also accurately complete shipping documents, comply with section 16 of the Shipping Act, preserve the confidentiality of any sensitive information received by its shipper clients and handle large sums of money advanced for the

[10] 5 U.S.C. 556(d); *United Church of Christ v. Federal Communications Commission,* 425 F.2d 543, 545, 549–550 (D.C. Cir. 1969); *Towne Services Household Goods Transportation Co. v. United States,* 329 F. Supp. 815, 821–822 (W.D. Tex. 1971); *Quickie Transport Co. v. United States,* 169 F. Supp. 826, 828 (D. Minn. 1959), aff'd *per curiam,* 361 U.S. 36 (1959).

[11] There is no factual basis for Lesco's assertion that section 44 holds forwarder applicants to an unreasonably high standard of proof regarding fitness. Section 44 states only that the Commission must "find" the applicant fit, willing and able. The Commission has licensed over 1,500 independent ocean freight forwarders since 1961 and denied less than 100 applications on fitness grounds.

payment of freight. Such a person must not only be honest, but must affirmatively strive to meet the regulatory requirements under which he operates. However, Lesco's late arrival at the hearing and its unfamiliarity with the Commission's Rules of Practice are not matters of decisional significance in passing upon its "fitness" under section 44.

Lesco had no obligation to secure counsel, and that portion of the Initial Decision which relied upon Lesco's clumsiness in representing itself *pro se* was erroneous. In order to avoid any suggestion that irrelevant factors were weighed in our decision to deny Lesco's license application, we expressly find that Lesco lacked the requisite character qualifications without regard to the manner in which it conducted itself before the Commission subsequent to August 14, 1974.[12] Mr. Betheil's past disregard for the shipping laws and the Commission's regulations, coupled with the absence of convincing evidence that positive steps have been taken to reasonably assure against the repetition of such incidents, is alone sufficient basis for not placing Lesco in the position of trust and responsibility enjoyed by licensed freight forwarders. Based upon the entire record before us, we find that Lesco is not "fit" within the meaning of section 44 to carry on the business of freight forwarding and will enter an appropriate order denying its present license application.[13]

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

[12] This is not to say, however, that the Commission cannot or will not find that an applicant's disregard of or chronic inattention to official communications of any type reflects adversely upon its willingness and ability to cooperate with a federal regulatory scheme.

[13] The Presiding Officer expressed his conclusions in terms of four issues formulated by himself rather than the two issues specified in the Commission's August 14, 1974, Order of Investigation and Hearing. He also failed to make specific rather than narrative findings of fact. These errors were harmless under the circumstances. More troublesome is the Presiding Officer's insistence on using the standards of "reasonable doubt," "reasonable man," and "substantial doubt," as the basis for finding Lesco unfit to receive a license. The Presiding Officer has erroneously applied the standards of an appellate rather than a trial tribunal. The trier of fact is obliged to determine whether an applicant is fit or not fit, he does not decide whether some reasonable man might entertain substantial doubts concerning fitness. After reviewing the record in this proceeding the Commission unequivocally concludes that Lesco is unfit to be licensed.

FEDERAL MARITIME COMMISSION

DOCKET NO. 74-31

INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION LESCO PACKING CO., INC.

ORDER

The Commission having fully considered the above matter and having this date made and entered of record a Report containing its findings, conclusions and decision therein, which Report is hereby referred to and made a part hereof;

IT IS ORDERED, That the license application of Lesco Packing Co., Inc., is hereby denied pursuant to section 44(b), Shipping Act, 1916.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 474

ANDREW CORPORATION INTERNATIONAL

v.

ATLANTIC GULF SERVICE

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND OF CHARGES

May 21, 1976

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on May 21, 1976.

It is Ordered, That applicant is authorized to refund $2,960.82 of the charges previously assessed Andrew Corporation International.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 474 that effective May 15, 1975, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from May 15, 1975, through July 11, 1975, the contract service two rate on 'Telecommunications, Viz Microwave Communication Systems and Equipment' is $83.00 WM, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That refund of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 474

ANDREW CORPORATION INTERNATIONAL

v.

ATLANTIC GULF SERVICE

Adopted May 21, 1976

Application for permission to refund a portion of the freight charges granted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

Atlantic Gulf Service (AGS) has applied for permission to refund $2,960.82 to Andrew Corporation International.

AGS carried one shipment bearing the tariff description Telecommunications, VIZ, Microwave Communication Systems and Equipment, from New Orleans to Glasgow under a bill of lading dated June 6, 1975. The shipment weighed 9,981 lbs. and measured 1,066 cu. ft. AGS collected aggregate freight charges of $5,172.77 from Andrew on July 21, 1975. The freight charges collected were based upon the Cargo N.O.S. rate found in Gulf United Kingdom Tariff No. 37 (FMC 16). AGS now seeks to apply a rate of $83.00 W/M with aggregate freight charges of $2,211.95. In support of its application to refund $2,960.82 AGS states:

> On February 15, 1975, Gulf/United Kingdom Conference filed a contract service two rate of $75.00 wm and non-contract $88.20 wm, plus energy surcharge to be effective for 90 days for Telecommunication Equipment. On May 23 the energy surcharge was rolled into the rate [making the contract rate $83.00].
>
> Rate was expired on May 15, 1975, and through oversight the rate was not extended for tariff quoting period.
>
> Meanwhile on June 6, 1975, Atlantic Gulf Service loaded a shipment for Andrew Corporation International to M/S VASAHOLM. At that time the rate had expired and our manifest department applied the Cargo NOS rate to this shipment.
>
> On July 11, 1975, the error of not extending the rate was noted and the Conference immediately reinstated the rate with the energy surcharge rolled in.
>
> Because we feel that the shipper should not be charged for this error, the present is to request permission to refund to the shipper the difference between the $194.00 wm

[1] This decision became the decision of the Commission May 21, 1976.

General Cargo rate charged and the $83.00 wm which should have been charged or $2960.82.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[2] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[3] states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

The inadvertent failure to extend the contract rate on the commodity in question would appear to fall within the intended grounds for refund. All the other conditions have also been met. Accordingly, Atlantic Gulf

[2] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

[3] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges*, under *Purpose of the Bill.*

Service is hereby granted permission to refund to Andrew Corporation International the sum of $2,960.82.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
April 28, 1976.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 471

PHILLIPS PETROLEUM CO.

v.

PACIFIC WESTBOUND CONFERENCE

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND OF CHARGES

May 27, 1976

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on May 27, 1976.

It is Ordered, That applicant is authorized to refund $2,079.69 of the charges previously assessed Phillips Petroleum Company.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 471 that effective March 2, 1975, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from March 2, 1975, through March 11, 1975, the contract rate to Hong Kong on 'Liquified Petroleum Gas, LPG, Restricted to On Deck Stowage' is $87.75 W/M, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That refund of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 471

PHILLIPS PETROLEUM CO.

v.

PACIFIC WESTBOUND CONFERENCE

Adopted May 27, 1976

Application for permission to refund a portion of the freight charges granted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

The Pacific Westbound Conference (PWC) has applied for permission to refund to Phillips Petroleum Company a portion of the freight charges on a shipment of fifty cylinders of Liquified Petroleum Gas weighing 18,800 pounds and measuring 550 cubic feet. Under bill of lading dated March 2, 1975, the *M. S. Queensville* of Barber Blue Sea Lines carried the shipment from Los Angeles to Hong Kong.

The rate applicable at the time of shipment was $239.00 W/M (2,000 pounds or 40 cubic feet) based on Item 340.0000.03 Pacific Westbound *Overland* Tariff No. 6–F.M.C.–13. The rate sought to be applied is $87.75 W/M based on Item 341.104.36, Pacific Coast Westbound Local Tariff No. 4–F.M.C.–12. The aggregate freight charges collected were $3,286.25. The aggregate freight charges sought to be applied are $1,206.56. The requested refund is $2,079.69. In support of the applied for permission to refund the monies, applicant states:

> Under the Pacific Westbound Conference Local Tariff #3–FMC–8 up to January 15, 1975 there was a commodity item #2575 in the tariff reading "PETROLEUM GAS, LIQUID BUTANE; FUEL PRESSURING, LIQUID PROPANE" at the rate of $87.75 per 2000# or 40 Cft whichever produces the greater revenue (W/M). Under Rule #24 covering Dangerous or Hazardous Cargo there was provision to except from the Dangerous and Hazardous Cargo rate per Item 695 cases in which specific commodity rates were provided in individual commodity items or by authorized interpretation in the tariff index. Although the commodity in question, Liquified Petroleum Gas, must be stowed on deck only per Code of Federal Regulations, Title 46, this commodity was excepted from the Dangerous and Hazardous Cargo rate Item 695 inasmuch as there

[1] This decision became the decision of the Commission May 27, 1976.

was a specific commodity rate provided in the individual commodity items, i.e. Item 2575.

The shipment in question was an Overland shipment, but as there was no specific commodity rate in the Pacific Westbound Conference Overland Tariff #5–FMC–9, the rate under the Local Tariff #3 was applicable as it was less than the Cargo N.O.S. rate in the Overland Tariff.

The Pacific Westbound Conference Local Tariff #4–FMC–12 and the Pacific Westbound Conference Overland Tariff #6–FMC–13 effective January 15, 1975, were completely revised changing from item rates as in the previous editions, to rates on the individual Schedule B Commodity numbers as used on the U.S. Customs Shipper's Export Declaration. In the revised tariffs a provision for specific rate for Liquified Petroleum Gas at the same rate of $87.75 W/M was overlooked, therefore leaving the only classification for this product under 340.0000.03 at $240.00 in the Local Tariff and $239.00 in the Overland Tariff both W/M.

Item #341.1040.36 added to Pacific Westbound Conference Local Tariff #4–FMC–12 covering Liquified Petroleum Gas, LPG, restricted to On-Deck stowage at $87.75 W/M effective March 11, 1975.

Because I was unable from the foregoing to construct the precise sequence of events with any degree of certainty, I wrote applicant a letter in which I apprised applicant that from the application I understood the following to have taken place:

Prior to January 15, 1975, the PWC *Local* Tariff # 3 carried a specific commodity item # 2575 reading "Petroleum Gas, Liquid Butane; Fuel Pressuring, Liquid Propane" with a rate of $87.75 per 2000 # or 40 Cft. whichever produces the greater revenue. The PWC Overland Tariff however carried no such specific commodity rate.

A complete revision of both the Local and Overland tariffs was undertaken in order to change "from item rates as in the previous editions to rates on the individual Schedule B Commodity numbers as used on the U. S. Customs Shipper's Export Declaration." The revised tariffs became effective January 15, 1975. However, in the revision the specific item for Liquified Petroleum Gas at $87.75 was overlooked. (Presumably only in the revised Local tariff since it never existed in the overland tariff.) This "oversight" resulted in two items applicable to the shipment in question. Item 340.0000.03 at $240.00 W/M in the Local tariff and 340.0000.03 at $239.00 W/M in the Overland tariff.

Item (4) of your application states that the "shipment in question was an Overland shipment, but as there was no specific commodity rate in the . . . Overland Tariff # 5 . . . the rate under the Local Tariff # 3 was applicable as it was less than the cargo NOS rate in the Overland Tariff." Both of these tariffs are the old prerevision tariffs.

The shipment moved on bill of lading dated March 2, 1975, and moved under the Overland tariff—presumably because it was an overland shipment. Yet under item (1) of the application you propose to amend the revised *Local* tariff by the addition of Item 341.1040.36.

I then proposed two questions (1) How does an overland shipment move or get rated under a local tariff? and (2) Since there never was a specific commodity item for "Liquified Petroleum Gas" in the overland tariff, how does the revision in the local tariff and its subsequent amendment constitute grounds for authorizing the requested refund?

Applicant replied by way of clarifying the matters set forth in the application. The relevant parts of the reply are as follows:

Your letter of March 23 concerning Special Docket No. 471, Phillips Petroleum Company vs. Pacific Westbound Conference, is certainly appreciated. You are absolutely correct as to the sequence of events outlined in paragraph 3,4,5, and 6 of your letter.

Your question of how does an Overland Shipment move under a Local Tariff is answered by the application of Overland Tariff Rule #1, which we are attaching for your ready reference. This particular portion of Overland Tariff Rule #1 has been in existence for quite a few years and basically it states, that where there is no specific commodity rate contained in the Overland Tariff, but there is a specific commodity rate found in the Local Tariff, and the use of that Local Tariff Rate is lower than the cargo NOS rate level in the Overland Tariff, or on a less specifically described commodity in the Overland Tariff, the use of the Local rate item may be applied to the Overland shipment.

When the Conference changed the format of its Tariffs in January, 1975, our previous Local and Overland Tariffs contained several hundred commodity items. When we adopted the Schedule B format, these several hundred items became several thousand items, and unfortunately one of the items overlooked to be included in our Tariff was Liquified Petroleum Gas.

Since it was not the intent of the Conference to increase Shipper's Rates when the tariff format was changed, we immediately put in our Local Tariff a specific commodity rate item covering the product that Phillips Petroleum Company ships. The specific rate item was put in our Local Tariff just as it was in our former Local Tariff and since this specific rate in the Local Tariff was lower than the less specifically described commodity, and the cargo NOS rate items in our Overland Tariff the Local rate was made to apply.

One wonders why it wouldn't be easier and somewhat less confusing to amend both the overland and local tariffs.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[2] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends

[2] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[3] states the *Purpose of the Bill:*

[Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

In view of the Overland Tariff Rule 1 and the obviously inadvertent error made in changing to Schedule B nomenclature, the application should be granted.

It is therefore found that:

1. There was a tariff filing error due to inadvertence;

2.Such refund will not result in discrimination among shippers;

3. Prior to applying for authority to refund a portion of the freight charges, PWC filed a new tariff which set forth the rate on which the refund would be based; and

4. The application was filed within one hundred and eighty days from the date of shipment.

Accordingly, the Pacific Westbound Conference will be permitted to refund $2,079.69 to the Phillips Petroleum Company.

An appropriate notice will be published in the tariff of the Pacific Westbound Conference.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
May 4, 1976.

[3] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges,* under *Purpose of the Bill.*

FEDERAL MARITIME COMMISSION

DOCKET NO. 74-8

EUROPEAN TRADE SPECIALISTS, INC., AND KUNZLE & TASIN

v.

PRUDENTIAL-GRACE LINES, INC., AND THE HIPAGE CO., INC.

Respondent Prudential-Grace Lines, Inc. found not to have violated sections 16 and 17 of the Shipping Act, 1916;
Respondent The Hipage Company, Inc., found not to have violated section 16 of the Shipping Act, 1916;
Issue remanded for further proceedings with regard to alleged violation of section 18(b) of the Shipping Act, 1916 by respondent Prudential-Grace Lines, Inc.
Issue remanded for further proceedings with regard to alleged violation of section 17 by respondent The Hipage Company, Inc.

William L. Borden for Complainants.
John B. King, Jr. for Respondent, The Hipage Company, Inc.
John H. Purcell for Respondent, Prudential-Grace Lines, Inc.

REPORT AND ORDER ON REMAND

May 27, 1976

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Ashton C. Barrett and James V. Day, *Commissioners;* Clarence Morse, *Vice Chairman,* concurring)*

PROCEEDINGS

This case arose by complaint of European Trade Specialists, Inc. (hereinafter "European") on behalf of itself as shipper and on behalf of its consignee Kunzle & Tasin (hereinafter "K&T") alleging violation of sections of the Shipping Act, 1916 (the Act) by Prudential-Grace (Prudential) and by The Hipage Co. (Hipage), Complainant's freight forwarder. The Complainant alleged, in summary, that Prudential had violated sections 16, 17 and 18(b) of the Act and that Hipage had violated sections 16 and 17 of the Act.

The claim in this case results from an alleged overcharge by Prudential

*Commissioner Bob Casey not participating.

for freight on a single shipment of goods from Norfolk, Virginia to Genoa, Italy aboard Prudential's vessel S.S. LASH ESPANA. In essence, Complainants allege that the carrier, Prudential, misclassified the commodity which made up the cargo and therefore applied an excessive tariff rate in violation of section 18(b)(3) of the Act. In the course of this transaction both the carrier, Prudential, and the forwarder, Hipage, are also alleged to have acted in such a manner as to have violated sections 16 and 17 of the Act.

Following certain procedural maneuvering involving the amendment of the Complaint, controversy as to proper parties, complicated discovery, and disputes related thereto, the case came before Chief Administrative Law Judge Cograve for hearing. Judge Cograve thereafter issued his Initial Decision finding no violations as alleged and dismissing the complaint. Exceptions to his decision and replies thereto were duly filed. This proceeding came before the Commission on those exceptions and on oral argument heard before the Commission.

FACTS[1]

The shipper, European, is a U.S. exporter based near Cleveland, Ohio; its consignee and co-complainant, K&T, is a partnership based in Milan, Italy. International Great Lakes Shipping Company (also known and cited here as "Lavino") of Cleveland was, at the time pertinent, the agent of Prudential, a common carrier by water subject to the Act; Hipage is a freight forwarder licensed by the Commission with its principal offices in Norfolk, Virginia.

In January 1972, a representative of Lavino met with the President of European to discuss a shipment of certain goods by European from Norfolk to Genoa. At that meeting, the two parties viewed both the commodity to be shipped and certain sales literature regarding the product. This discussion was hald to make a tentative determination of the nature of the commodity and its likely rating under the appropriate tariff.[2] The commodity was a quantity of discs made of synthetic material impregnated with abrasives and designed to be used on industrial or institutional floors for scrubbing and polishing. The trade name of this commodity was "Roto-Pads".

Notwithstanding the form of the commodity, i.e., pads, the Lavino representative informed European's President that the cargo in question would be rated as "abrasive cloth" under Item 0101 of the Tariff. That item provides for carriage of:

"Abrasive(s), viz:

[1] As a result, in large measure, of a confused and confusing theory of the case held by Complainants, there are many irrelevant facts brought out in the transcript, briefs, discovery and various motions filed by the parties. In order to pare these superfluous matters down to a workable form which is relevant to justiciable charges under the Shipping Act, we have taken certain editorial licenses. No fact, material or relevant, to the alleged violation of the Act, however, has been omitted.

[2] The applicable tariff is that of the North Atlantic Mediterranean Freight Conference (Tariff No. 10-FMC-3).

* * *

Cloth, NOT in Belt Form or Rolls (Not Pads, Scouring, or Materials Therefor)"

on a weight basis.

Following this meeting, European selected Prudential as its carrier and space was booked upon Prudential's S.S. LASH ESPANA for transport in February 1972. The booking was confirmed, a booking notice was sent to Hipage (selected by European as its forwarder), to Prudential's agents in Norfolk and to Prudential's offices in New York.

Hipage received its copy of the booking notice on January 17, 1972, and, on January 29, 1972, Hipage also received European's "Purchase Order and Shipping Instructions." This document contains an entry entitled "Freight commodity class of goods" in which appeared the statement: "Conference Item 0101, Abrasive Cloth at $122.38 per 2240 lbs." The document also contained a block entitled "description of goods." Here appeared the description: "Roto-Pads . . . Polishing Scrubbing."

Based, apparently, upon European's "Purchase Order and Shipping Instructions," Hipage prepared various requisite shipping documents. Among those was the ocean bill of lading on which the cargo was described as "92 cartons Roto-Pad Abrasive Floor Maintenance Pads." Upon presentation of this bill of lading to the carrier's agent, the cargo was rated "Cargo, NOS" resulting in a freight charge of $2,738.70 (including a bunker surcharge). Under Tariff Item 0101, described above, the freight charges would have totaled $206.25. This sum is apparently included in the vastly higher "damages" figure sought.

In April 1972, following shipment and payment by consignees for the transportation, Complainants, Respondents, and their various agents exchanged numerous telephone calls and much correspondence regarding the alleged overcharge. The result of this activity was the issuance in May 1972, by Prudential's agent of a Notice of Correction. This Notice corrected the description of the goods from "Roto-Pad Abrasive Floor Maintenance Pads" to "Roto-Pad Abrasive Floor *Cloth*" (emphasis added) with a corresponding change in applicable rates. However, in June 1972, this first Notice of Correction was itself corrected by a further Notice which re-instated the "Cargo, NOS" rate but left the description as "cloth."

The circumstances leading to the issuance of the second Notice are far from clear from the record. The Notice itself merely provides:

> "As per telecon with Richard Egloff [of Prudential] June 12, 1972, correction No. 22 cancelled. Correction No. 23 to revert charges back as per original issuances [sic] of the bill of lading."

No refund was made at any time.

From these basic facts, Complainants have constructed their allegations of violations of the Shipping Act by Prudential and Hipage. The alleged

actions of Respondents and the consequent charges against them read in part as follows:

> Complainant charges the respondent companies with violations of the Shipping Act . . . as well as violations of the laws of contract and the laws governing principal and agent within the context of the Shipping Act as follows:
>
> A. Respondent Prudential-Grace Lines . . . offered to ship the goods under Item Number 0101. . . ."
>
> B. The complainant accepted and acted in reliance upon the offer of shipment.
>
> E. Respondent Hipage Company prepared the bill of lading on a pre-printed form furnished by respondent Prudential-Grace Lines. The goods were described as "92 Cartons: Roto-Pad Abrasive Floor maintenance Pads," notwithstanding complainant's express instructions that the goods were to be described as "Conference Item No. 0101, Abrasive Cloth. . . ."
>
> M. *** The representation of this "agent" [Hipage] of the interests of its principal in arm's-length dealings with a "third party", the carrier, resulted in unjust enrichment of the "third party" to the extent of more than 13 times as much money as the "third party" had agreed to accept. ***
>
> The conduct of respondent Prudential-Grace Lines and respondent Hipage Company is integrally intertwined as, respectively, principal in fact and agent in fact. The result of their joint conduct was to defraud and severely injure complainant.

Upon review of all allegations, however, it is clear that the gravamen of these charges is addressed to this Commission in terms of alleged breach by Respondents of such common law principles as duties of agent to principal, common law fraud, detrimental reliance and unjust enrichment. Only briefly and obliquely do Complainants address the central issues of the alleged violations of sections 16, 17, and 18 of the Shipping Act.

As Judge Cograve made quite clear in his Initial Decision, this Commission does not exercise the authority of a court of law or of equity. We administer and enforce the requirements of the Shipping Act and related Acts. When pleadings come before us in which violations of the Act are heavily veiled in common law pleadings it becomes difficult to distill the activities alleged to be in violation of the Act from those which indicate the possible violations of some common law obligation. We have, notheless, reviewed the entire record in an attempt to identify with some certainty the particular violations of the Act complained of. Thus, we have not ignored the underlying theories of common law wrong, but, rather, have attempted to pare them down to activities at least colorably justiciable under the mandates of sections 16, 17 and 18 of the Shipping Act, 1916.

Discussion and Conclusions

The Initial Decision in this case addressed the alleged violations against the forwarder, Hipage, and the carrier, Prudential, *seriatim*. In the interest of clarity, we will track that decision and discuss each issue raised on exception to the decision as it arises, insofar as that is possible.

Judge Cograve dealt first with the violations of section 16 alleged to have been perpetrated by Hipage. From the rather unclear allegations

contained in Complainants' complaint and brief, Judge Cograve deduced that:

> . . . complainants first charge Hipage with a violation of section 16 . . . which makes it unlawful to give any person, locality or description of traffic an undue or unreasonable preference or advantage or to subject the same to some unreasonable prejudice or disadvantage.
>
> Complainants' assertion of a violation of section 16 is based solely upon the failure of Hipage to clarify the commodity shipped as Tariff Item 0101. *** It would appear that Hipage originally did prepare a bill of lading with that description but that someone, probably Lavino, as Prudential's agent questioned the description, and it was changed to Roto-Pad Abrasive Floor Maintenance Pads. Thus, complainants urge, Hipage failed as an agent for the Shipper to "faithfully" carry out its obligations to its principal. Hipage, also violated section 16 it is alleged because it did not promptly inform its principal European Trade that there was some question as to the proper classification of the goods. . . .

In deciding the issue of section 16 violations by Hipage, Judge Cograve points out the difficulty which Complainants' allegations create with respect to a claim which is justiciable under section 16 of the Act. Apparently, Complainants are determined that a breach by an agent of his duty to his principal constitutes, *ipso facto,* a subjecting of a person or locality to unreasonable prejudice or disadvantage or the giving to another person or locality an undue or unreasonable preference or advantage. In rejecting this theory as totally untenable, Judge Cograve reasoned:

> . . . whatever may have been the justiciable derelictions of Hipage under other sections of the Act, the essence of any violation of section 16 is preference or prejudice to one to the advantage or detriment of a similarly situated other.

Complainants repeatedly have sought to support the alleged violations by Hipage of section 16 by claiming that Hipage subjected Complainants to undue prejudice or disadvantage to the advantage of the 3M Company, allegedly a competitor of Complainants in the abrasive pad business. Judge Cograve noted that while Complainants repeatedly attempted to show such a preference or advantage to 3M to the detriment of European, they were wholly unable to show that the alleged competitor had ever shipped any cargo whatsoever on Prudential ships, much less the commodity involved here or that Hipage had ever handled any shipments of any sort for 3M. While Complainants were able to show that the introduction of Tariff Item 0101 was prompted some years previously at the request of 3M, the origin of Item 0101 is, as Judge Cograve explained, "irrelevant to this particular case." Whether or not this rate was instigated by 3M would be of relevance only if it could be shown that 3M also shipped a similar commodity to that of Complainant and was assessed that rate while Complainants had been assessed a higher rate.

Undaunted by their inability to show any competitive relationship between themselves and 3M (or any other shipper), Complainants attempt to circumvent the need for a showing of competitive relationship citing *Valley Evaporating Co. v. Grace Lines,* 14 F.M.C. 16 (1970) for the proposition that no competitive relationship need exist in order for a

violation of section 16 to be found. Judge Cograve discussed this case at length in his Initial Decision and, in our opinion, correctly distinguished that case from the present controversy. As Judge Cograve explained, the peculiar facts of the *Valley* case were such that: "... once the Conference had established its criteria [for retaining commodity rates], all shippers were entitled to equal treatment under those criteria whether or not there was a competitive relationship between them." Thus, in that case, when the conference eliminated a certain commodity rate in violation of its own criteria, a violation of section 16 could be made out notwithstanding a lack of competitive relationships among or between shippers.

Complainants cite the holding as creating an "absolute obligation" doctrine which they seek to have applied here. Unfortunately, as Judge Cograve observed,

> ... complainants are unclear as to just what absolute obligation Hipage was under. As near as can be determined from a rambling and confused brief, the obligation of Hipage was to follow the instructions of European trade wherever they may lead. Thus, a failure of Hipage to somehow or other see that Lavino and Prudential accepted the classification of Item 0101, in the view of European constituted a violation of section 16.

Unable to accept the allegations of Complainants in this regard, Judge Cograve dismissed the allegation that Hipage had acted in violation of section 16.

Dismissal of this allegation is challenged on exception by Complainants. Their exception is in large measure simply a restatement of the arguments already advanced before the Presiding Officer and properly disposed of by him.

Rather than attempt to paraphrase Complainant's position, we feel compelled to use its own language. Complainants allege that:

> The record shows that Hipage usually represented the interests of the Shipper, and not the interests of the carrier; whereas, here, Hipage represented the interests of the carrier, and not the interests of the shipper, by typing the freight rate the carrier wanted contrary to received and understood shipper instructions.
>
> * * *
>
> The heart of the charge is that Hipage was under an absolute obligation to represent shipper interests rather [than] carrier interests, and to advise and consult with the shipper before implementing an extortionary freight charge wanted by the carrier.
>
> * * *
>
> Thus complainants take exception to the view of the Initial Decision on Hipage, in relation to section 16. That view is inequitable and contrary to the precedent of the cases which the Decision cites, these cases having ruled that, in circumstances comparable to those obtaining here, a competitive relationship need not be shown.

Hipage replied to this exception specifically and took strong objection to the position of Complainants. Hipage submits that:

In order to violate § 16 of the Act (46 U.S.C. § 815), it is necessary that Hipage have given an undue or unreasonable preference or advantage to some person, locality or description of traffic or have subjected European Trade Specialists and Kunzel & Tasin to some unreasonable prejudice or disadvantage. As the initial decision ably points out, in order to have a violation of § 16, there must be a party preferred and a party prejudiced. There was no showing at the hearing that the Hipage Company treated any other shipper differently than it treated Complainants. . . .

As to the alleged "absolute obligation" to the shipper which Complainants alleged and reargued, Hipage states:

. . . it is unclear as to how Hipage could have prevented the carrier from charging the rate that was charged. That § 16 imposes no such duty [to prevent a carrier's application of a certain rate] on a freight forwarder is clear.

* * *

Under complainants "absolute obligation" theory, a forwarder would be under an obligation to misdescribe goods if his principal so directed. The Administrative Law Judge discussed in detail the case of *Valley Evaporating Co. v. Grace Line* 14 F.M.C. 16 (1970), which is relied on by Complainants to support their absolute obligation theory and succinctly stated why that decision has no application to the present case. The Law Judge's interpretation of *Valley Evaporating* is the correct and Complainant's exceptions in this regard are not well taken.

We conclude that Judge Cograve's denial of the "absolute obligation" claim under these circumstances and the reasons cited by him are proper.

What Complainants are in effect alleging, under color of section 16, is a violation by Hipage of its duty to its principal under the principles of common law. We have no jurisdiction over such a claim. Further, we are of the opinion that were we to espouse the sort of duty allegedly owed by Hipage to its principal compliance by a forwarder with such a duty could well result, in itself, in a violation of the Shipping Act.

The alleged violation by Hipage of section 17 of the Act is, as Judge Cograve determined, two-fold. First, it is alleged that by its inability to secure classification of the cargo under Item 0101, Hipage "betrayed the shipper" by misdescribing the commodity. Second, Complainant contends that Hipage violated its duty to the shipper under section 17 by failing to apprise the shipper of any dispute or discrepancy as to the rate to be applied to the goods. Even assuming that these charges constitute a proper allegation of wrongdoing *under the Shipping Act,* Judge Cograve was unable to find that the actions of Hipage were violative of section 17.

As to the first allegation, Judge Cograve cited testimony in the transcript showing Lavino's (the carrier's agent) skepticism as to shipper's desired rating, the subsequent description of the goods as "Roto-Pads" and the rating of the cargo as "Cargo, NOS." On this basis, he concluded that:

. . . there is no question, even complainants admit, that the description Roto-Pad, Abrasive Floor Maintenance Pads accurately described the commodity shipped. Just where then is the unjust and unreasonable practice engaged in by Hipage? I can find none.

As to the second allegation, Judge Cograve found that when the

numerous discussions of possible overcharge were held among the parties some months after shipment, at no time was there any complaint made by European to Hipage regarding the manner in which Hipage had handled the matter or the efforts made by Hipage to clarify and solve the disagreement as to freight charges. Judge Cograve found that the record of this proceeding simply would not allow him to reach any conclusion on the issue of whether Hipage had properly informed its shipper prior to shipment of the discrepancy in the applied rate. Thus, he dismissed the section 17 charge for failure of Complainants to sustain their burden of proof. As the Presiding Officer himself explained:

> The record in this case simply will not allow a definitive disposition of this issue. Mr. Ballard of Hipage testified that in the ordinary course of business the shipper would have been contacted and told of the problem. However Mr. Meade of European Trade had no recollection of any such call.
>
> At this point in the hearing, counsel for European Trade requested a continuance for the taking of depositions of European Trade's secretary. The request was opposed. I [Judge Cograve] denied the request on the ground that far from being surprised by the testimony of Mr. Ballard, counsel from European Trade had from the beginning made an issue of the lack of communication from Hipage. The burden of proving its case was upon European Trade. A part of that case was the failure of Hipage to inform European Trade of the dispute over the rate when it first arose. Counsel for European Trade had every opportunity to call any witness he chose, however he elected not to call Mr. Meade's secretary. However, in the interest of fairness I [Judge Cograve] allowed counsel for complainants an opportunity to file with me, after his review of the record, a motion for the taking of depositions. This was to allow complainants an opportunity to establish their surprise on the basis of the record in the case. No such motion was filed. Accordingly complainants having failed to prove Hipage had engaged in an unjust or unreasonable practice in the handling of the shipment in question, the charge that Hipage violated section 17 of the Shipping Act is dismissed.

The second allegation also includes, tangentially, a claim by Complainants that the alleged failure to inform its shippers of disputes incorporated other derelictions by Hipage. These include, as best as we can determine, allegations that Hipage violated section 17 by failing to make an adequate investigation of Complainant's claim following shipment, by failing to conform to its "usual routine" in such cases, and by failing to have published any sort of regulations for the handling by Hipage of such claims. All of these alleged derelictions are said by Complainants to subject them to undue prejudice or disadvantage to the advantage or benefit of another in violation of section 17. Finally, Hipage's alleged failure to have published its own regulations is claimed to be a violation of Commission General Order 4 applicable to freight forwarders.

Judge Cograve found no evidence satisfactory to him which would justify a finding of a violation of section 17 in any of the respects alleged by Complainants. Complainants have taken exception to this conclusion and each finding on which it is based. We will address each of these exceptions separately.

Complainants take exception to the failure of the Initial Decision to address their contention that Hipage violated Commission General Order

4. Complainants nowhere specified how General Order 4 may have been breached but simply allege this conclusory argument. We have been unable to determine on our own how this claim might be supported and have not been shown a way by Complainants. In fact nothing in the law or in the factual record in this proceeding will support this allegation. Certainly, and if this be the crux of Complainant's charge, there is no requirement under section 17 of the Act that forwarders publish their regulations and procedures. Nor has this Commission, either in General Order 4 or elsewhere by rule or decision, mandated that a licensed freight forwarder must establish and publish a special body of regulations. We therefore, find this exception to be without merit.[3]

Additionally, Complainants contend that Judge Cograve erred in rejecting their argument that Hipage's failure to abide by its shipper's instructions constituted an unjust and unreasonable practice in violation of section 17 of the Act. Specifically, they take issue with the Presiding Officer's conclusion that:

> There is no question, even complainants admit, that the description Roto Pad, Abrasive Floor Maintenance Pads accurately described the commodity shipped.

Complainants challenge this finding on the ground that it is "irrelevant and misleading." They urge that the important fact here is that:

> Hipage knew the description the shipper wanted. There was a *scienter* here; for Hipage started to carry out the shipper's wish [citation omitted; emphasis original]. Hipage also knew the description the carrier wanted. Both descriptions were equally accurate.
>
> * * *
>
> What did Respondent Hipage do? It elected to please the carrier.
>
> * * *
>
> This, in the opinion of complainants, is unjust and unreasonable and should move the conscience of the Commission.

In reply to this exception Hipage explains its action thus:

> The only source of this information [on which the description was based] was Complainants own shipping documents and sales literature, and this description was not something conjured up by Hipage and Prudential-Grace in an effort to defraud either of Complainants.
>
> * * *
>
> The Hipage Company fulfilled its obligation as a forwarder of accurately describing the goods in preparing the bill of lading based on information supplied by the shipper and by accurately describing the commodity did not engage in unreasonable practices within the meaning of section 17 of the Shipping Act.

This Commission, concurring with Judge Cograve and Hipage, finds

[3] If, by this general exception, Complainants refer to a failure by Hipage to inform its principal of any controversy over the shipment in question, we have incorporated that reference in our discussion of the alleged section 17 violation by Hipage. We have considered that action to be justiciable under section 17 and have included that issue in our order on remand.

that there is no evidence in the record of any collusion between Hipage and Prudential. Further, we agree that Hipage properly described the cargo as it is required by the Act to do. The alleged "scienter" seems to us to be irrelevant to a proceeding in which the pivotal issue is simply a determination of the nature of the commodity shipped.

Complainants further allege error in "the implication of the Initial Decision" that Complainants had lodged no complaint with Hipage regarding the handling of this matter of rate classification of the goods. Complainants argue that they did complain to Hipage; that Hipage failed to make an "internal" investigation of this complaint; that Hipage lacked the capability to make a "meaningful" investigation because it kept no record of the employees who handled the case; and that the Shipping Act imposes a duty on forwarders to provide a reasonable service in response to complaints which was absent here—that absence being a violation of section 17 of the Act.

Since this allegation was not addressed by Hipage, we have painstakingly reviewed the record of this proceeding in this regard and can find no support for Complainants' position. As far as may be ascertained from the record, when Complainants brought their problem to Hipage, Hipage did, in fact, take reasonable steps to intercede on Complainants' behalf with the carrier and the appropriate conference. Reduced to its essentials, theis exception only expresses dissatisfaction with Hipage's inability to induce the carrier or the conference to change its position on the rating question. We fail to see how this makes out a violation of section 17.

Finally, Complainants take exception to the conclusion of Judge Cograve that Hipage "followed its usual routine" in handling the alleged misclassification, insisting that the record shows that, in circumstances such as those prevailing here, the usual routine of a forwarder and of Hipage in particular would be to "inform the shipper that the carrier was objecting to proposed tariff classification, and to obtain additional product description from the shipper . . .; but none of this routine did respondent Hipage carry out."

Hipage, in its reply insists that the normal procedures were followed here adding that:

> This procedure would include examining the relevant shipping documents in an effort to ascertain a precise description of the goods, *communication with the shipper if the steamship company requested additional information in order to properly rate the cargo*, and preparation of relevant custom invoices, etc. (Emphasis ours.)

The record developed with respect to this issue is unclear. Whether or not Hipage was obliged to notify the shipper of any confusion, and whether or not he did so, does not appear. As a result, we are of the opinion that amplification of the actions or inactions involved must be addressed at further hearing before a determination may be made with respect to the alleged violation of section 17. We, therefore, are remanding this issue to the Administrative Law Judge for further hearing

with respect to Hipage's obligations and the sequence of events during the relevant times.

In this regard, Complainants also take exception to a statement in the Initial Decision that while Complainants were invited to file a motion to depose certain witnesses, to counter alleged "surprise" testimony offered by respondents' witnesses, "no such motion was filed." The fact is a motion was filed and Judge Cograve ruled against the requested taking of dispositions and denied the motion. Complainants never sought reconsideration or Commission review of this ruling. Since the testimony sought by that motion deals with the activity of Hipage with regard to the alleged violation of §17, which issue shall be reheard on remand, we are of the opinion that we need not rule on this exception.

The issues that remain relate to charges alleged against Prudential. We will discuss these in the order determined by Judge Cograve in his Initial Decision.

The first issue raised is the alleged violation by Prudential of section 16 of the Act. Complainants alleged that Prudential discriminated against "persons" in that it:

> (a) . . . discriminated in favor of the 3M Company and against the shipper consignee;
> (b) . . . discriminated in favor of the 3M Company and against shippers' North Carolina manufacturer;
> (c) . . . discriminated in favor of respondent carrier and against ocean carriers sailing from the Great Lakes and other U.S. ports;
> (d) . . . *discriminated in favor of respondent carrier and against other carriers sailing from Norfolk* (emphasis original);
> (e) . . . discriminated in favor of respondent carrier and against trans-Atlantic air freight carriers and;
> (f) . . . discriminated in favor of Norfolk forwarders and against forwarders in ports and at airports.

Without going into unnecessary detail, it is sufficient to relate here that Judge Cograve found none of these allegations to be supported either by the record or by the Complainants' arguments. With regard to the charge under (f) above, since Complainants themselves selected Hipage as their forwarder, Judge Cograve found great difficulty in determining how Prudential could have discriminated in favor of a forwarder in the selection of which it had no hand. As for the issues relating to alleged discrimination in favor of 3M Company, Judge Cograve again noted the absence of any showing that Prudential had ever carried any 3M cargo whatsoever (much less the same or similar commodity at issue here) which was given the Item 0101 rating for 3M.

With respect to the alleged self-preference of Prudential, Judge Cograve cited *Anglo-Canadian Ship. Co., Ltd. v. Mitsui S.S. Co., Ltd.*, 4 F.M.B. 535 (1955) to show that:

> . . . the Commission expressly excluded from section 16 the concept of "self-preference", i.e., in this case Prudential would have had to prefer a carrier other than itself to the prejudice of some other carrier, again other than itself.

Judge Cograve therefore dismissed the alleged section 16 violation as to *persons* on the ground that Complainants had failed to demonstrate on the record any preference by Prudential with respect to other carriers, air carriers or freight forwarders.

Complainants also allege violations by Prudential of section 16 with respect to *localities* in that Prudential:

> (a) . . . discriminated in favor of Minnesota, France, and Italy, where the 3M Company manufactures abrasive cloth, and against North Carolina where shipper's suppliers manufacture abrasive cloth, and
> (b) . . . discriminated in favor of the State of Virginia, where Norfolk is located and against other states where other ports and where airports are located.

Addressing these allegations Judge Cograve articulated a failing which typifies Complainants' brief and theory of the case. He stated:

> . . . here again complainants completely misread the law of preference and prejudice under section 16 . . . the essence of a violation of section 16 is that two similarly situated interests are treated differently without any justification and except in somewhat special instances there must be a competitive relationship between those two interests. There is no evidence whatsoever in the record that Prudential ever treated any locality any differently than it treated the port of Norfolk and the State of Virginia; and as already noted there is no evidence whatsoever that Prudential ever carried any 3M Company products.

But complainants fall back on their reading of *Valley Evaporating, supra*, and what they call the doctrine of "absolute obligation."

Once again, Judge Cograve distinguished the *Valley* case and concluded:

> . . . not only must complainants show that some other interest was preferred to their prejudice, but also that the interest was a competitor. The record is devoid of any such showing. Accordingly the charge that respondent Prudential violated section 16 is dismissed.

Judge Cograve then addressed the alleged violations by Prudential of section 17 of the Act. Again he felt compelled to express the allegations in Complainants' own words, noting that Complainants alleged that:

> . . . the false assurances of a tariff rate held out by the carrier's sales agents offend section 17 in that:
> (a) They were unjustly discriminatory in favor of the carrier and in favor of 3M Company, and against the shipper and consignee.
> (b) They were unjustly prejudicial (sic) to the shipper as an exporter, as compared with the 3M Company, a foreign competitor in its capacity as a manufacturer of abrasive cloth in France and Italy.
> (c) They were unjust and unreasonable practices, reflective of the absence of just and reasonable regulations and practices.

The allegation of paragraph (a) above was dismissed summarily by Judge Cograve for the obvious reason that:

> As noted a number of times before, there is no evidence of record that Prudential ever carried any 3M Company products much less aboard the same vessel, etc. as it carried European Trade's shipment.

The allegation of paragraph (b) above was interpreted by Judge Cograve to refer to the portion of section 17 which makes it unlawful for a

common carrier by water in the foreign commerce to charge a rate which is unjustly prejudicial to exporters from the United States as compared to their foreign competitors. On this point, Judge Cograve explained that the words of the Act contemplate two exporters, one from the United States and one a "foreign competitor," both of whom are competing for business at some third country of destination. Since the Presiding Officer found that such a situation simply was not presented here he dismissed the allegation. As he saw it:

> The charge as framed by complainants is based on competition from 3M Company plants located in Europe (France and Italy). No water carriage of any 3M products is ever alluded to. Just how this situation can bring into play the cited prohibition of section 17 is not made clear nor is it even discussed. It is indeed typical of the many manufactured allegations and arguments with which complainants' briefs are replete. Accordingly the charge that respondent Prudential was guilty of discrimination or prejudice under section 17 is dismissed.

Under section 17, therefore, there remained to be disposed of only the allegation that Prudential engaged in an unjust and unreasonable practice in that its agent International (Lavino) did not inform European of its (Lavino's) inability to bind Prudential to the rate initially quoted to Mr. Meade by Lavino. Citing testimony in the transcript, Judge Cograve concluded that Lavino's representative was not conclusive as to the rate applicable and that European's president was thoroughly aware through experience of the inability of an agent to quote an authoritative rating since the Conference and carriers were the final arbiters of the proper rate to be charged. Therefore, Judge Cograve concluded that:

> The charge that Prudential through its agent International [Lavino] committed an unjust or unreasonable practice under section 17 of the Act is dismissed.

All of Judge Cograve's conclusions regarding section 16 and section 17 have been challenged on exception by Complainants. Unfortunately, these exceptions do not differentiate between the claims under either section but rather are lumped together. Thus, Complainants again urge that Prudential violated section 17 in that: it held out assurances that the cargo would be rated under Item No. 0101; that Complainant shippers relied on this assurance to their detriment; that Prudentials' assurances were not realized when it rated the cargo as "Cargo, NOS"; that this rating made the assurances "false"; and that these "false assurances were unjust and unreasonable within the meaning of section 17." Additionally, Complainants reargue that when Prudential saw the description and tariff commodity classification described by the shipper as shown in the Purchase Order and Export Shipping Instructions, Prudential's failure to comply with these desires was unjust and unreasonable in violation of section 17.

Clearly, Complainants position on exceptions constitutes nothing more than a reargument of contentions made before Judge Cograve and rejected by him. While the activity sketched by Complainants might conceivably show a contract claim at common law based on "detrimental reliance," it

falls far short of establishing a violation of section 17 of the Act. Thus, we agree with Judge Cograve's disposition of this argument and accordingly dismiss Complainants exception in the same regard.

Additionally, we know of no requirement under the Shipping Act which obligates the carrier to acquiesce to a particular description of cargo *desired* by the shipper, particularly when the description *desired* appears to be inaccurate. The carrier's obligation in general is to rate the goods accurately according to the descriptions available to him.

Finally, Complainants contend that:

> Complainants sought to use a tariff item which their dominant competitor in the European market for this product, the 3M Company, had prompted into existence. The 3M Company could have used it, but complainants were improperly prevented from using it.
>
> The import of the Initial Decision is that, absent a "competitive relationship", Sections 16 and 17 of the Shipping Act offered parties in the position of complainants no remedy.
>
> * * *
>
> The Courts and the Commission did not so hold—*Port of San Diego, Valley Evaporating,* and *New York Foreign Freight,* cases cited in the Initial Decision . . .

As we have previously stated, we find that Judge Cograve has properly interpreted and distinguished the cases cited and concur in his finding as to the prerequisite showing, under the circumstances of this case, of a competitive relationship in order for the provisions of sections 16 or 17 to apply. Further, absent such a relationship or even with such a relationship, the allegations that 3M Company prompted into existence Item 0101 and "could have used it" are irrelevant and misleading.

The final allegation by European against Prudential is that Respondent Prudential violated section 18(b)(3) of the Act by classifying the goods shipped as "Cargo NOS." The essence of this claim is that while Prudential was "prima facie" justified in rating the cargo as it did with only the bill of lading before it, at some later date, when other information became available, Prudential was no longer so justified and the cargo should have been rated under Item 0101. The document on which Complainants rely most heavily in making this argument appears to be the "Purchase Order and Export Instructions"; specifically that portion which instructs the classification of the commodity to be under Item 0101. In short, Complainants urged that the carrier should have been bound by the shipper's instructions. Judge Cograve concluded, and properly so, however, that: "this is not, of course, the real question under section 18(b)(3). That question was and remains whether Item 0101 was the proper classification under the carrier's tariff."

On this issue Judge Cograve correctly noted that "complainants are caught up in an inconsistency." On one hand, Complainants claim that:

Based on the February 20 Bill of Lading description, the shipment was correctly classified, *prima facie*, as NOS cargo.

* * *

Based on that information [the bill of lading] they classified the commodity as NOS, in accord with published tariffs on file with the Commission. Their action did not offend the statute; rather, it implemented the statute.

On the other hand, Complainants went on to argue that once the carrier came into possession of further information such as the purchase order and shipping instructions and sales literature, it should have classified the cargo under Item 0101. As Judge Cograve stated, however, "the difficulty here is that the description used on the bill of lading can be and was constructed from those very documents." Further, the President of European testified that the description "Roto-Pad Abrasive Floor Maintenance Pads" accurately described the commodity. The only question to be answered, then, with regard to the alleged violation of section 18(b)(3), is whether this commodity should have been rated as "Abrasive(s) Cloth, NOT in Belt form or Rolls (NOT Pads, Scouring or Material therefor)". Judge Cograve concluded that the articles were (1) clearly "pads" rather than cloth, and (2) were scouring pads as so described on Complainants' own sales literature. Therefore, he concluded, the carrier was justified in not applying the Item 0101 rate and no violation of section 18(b)(3) was found.

Complainants took exception to the disposition of the "tariff classification issue." They alleged that:

The legal question (not defined or mentioned in the Initial Decision) is whether a shipper such as the one here, to whom the Item 0101 commodity tariff was addressed, could reasonably have understood it to include his product.

The issue as framed is, in the opinion of this Commission, clearly erroneous. The standard for whether or not a cargo is properly rated is only a determination of what the goods transported actually were. There is no "reasonable man" standard as applied to torts at common law.[4]

Complainants seem to realize the inadequacy of this objection under the Shipping Act, since they further argue the merits of the nature of the commodity. In this regard Complainants state that in their view either the "trade name" description or the commodity name description is accurate. Complainants maintain that the commodity description is appropriately rated under Tariff Item 0101 while the "trade name" description is properly rated under the Cargo, N.O.S. rate.

Notwithstanding these statements, Complainants go on to attack the conclusion of Judge Cograve that the product shipped was scouring pads or material therefor; hence properly excluded from the application of Item 0101. Complainants submit that it was error for the Presiding Officer to focus on shipper sales literature which lauds the value of the removable

[4] See, *e.g.*, *Western Publishing Co., Inc. v. Hapag Lloyd A.G.*, 13 S.R.R. 16 (1973) and *United States v. Farrell Lines, Inc.*, 13 S.R.R. 199 at 203–204 (1973).

center plug of the discs as "an excellent scouring pad for those hard-to-get-at places" and concluded therefrom that the entire pad must be for scouring since its center—clearly the same material—was touted as a scouring material.

In challenging this conclusion complainants argue that scouring pads are of the ilk of "S.O.S." pads or "Brillo" pads to be used on pots and pans and that the floor maintenance pads at issue here are not "scouring" pads. Having attempted this distinction between S.O.S. pads and the roto-pads at issue here, Complainants lapse into irrelevant argument as to why Judge Cograve was in error. In this connection, they claim that since the shipper could "reasonably" differentiate between its product and kitchen scouring pads:

> It is obvious that a shipper such as this one, to whom tariff Item 0101 was addressed, would reasonably have understood the exclusion of scouring material as exclusively "S.O.S." and "Brillo" and as not excluding his product made of different material and used for a different purpose.

As we have pointed out above, with respect to application of tariff rates under section 18(b)(3), the issue is not "what rate a reasonable person could expect to have applied." The issue for determination is simply what the actual nature of the commodity shipped is and whether or not the proper tariff rate was applied to that commodity. We are of the opinion that Judge Cograve was completely justified in relying upon the shipper's own sales literature and samples of the commodity itself in attempting to determine the true nature of the goods. Having thus made this determination as to the nature of the goods, the next question should involve the propriety of the rate applied to those goods. In this regard, we believe the record of this case to be inadequate.

Upon review of the Respondent Prudential's applicable tariff, it has come to our attention that on the date of shipment Prudential's tariff included a rate applicable to: "Pads, Scouring, or material therefor" which was $45.75 w/m (the contract rate) or $50.30 w/m (non-contract rate).[5] During the course of the entire proceeding, this rate was neither alluded to nor discussed by any party, nor was it raised *sua sponte* by the Administrative Law Judge. We are unable to understand this lapse, particularly, if indeed, the commodity shipped was "pads, scouring or material therefor" as found by Judge Cograve. This omission regarding an apparently applicable tariff rate indicates a continuing confusion as to the true nature of the goods and the properly applicable tariff rate. If the commodity shipped were "abrasive floor maintenance pads," as described in the bill of lading, we still are unable to determine whether or not the commodity is also "pads, scouring or material therefor." If the latter, item no. 1198 would clearly seem to be applicable. However, if the former, that item may or may not be applicable. We are of the opinion that resolution of the exact nature of the goods shipped, and therefore the

[5] Item No. 1198, 19th Rev. p. 94, No. Atl. Mediterranean Freight Conf. Tariff No. 10-FMC-3.

properly applicable rate, requires further evidentiary hearing. We are remanding this matter to the Administrative Law Judge for further hearings limited to the issues of the true nature of the commodity and the tariff rate which must be applied.

We have scrutinized each exception with reference to the record of this case and the Initial Decision rendered. That some specific exceptions have not been individually discussed does not mean that we have not considered them. Some have been subsumed in other exceptions and some are merely restatements of positions taken previously. Each, however, has been considered by us. Where the record permits, we have determined those issues as noted in our discussion of exceptions above. Where the record is unclear, we have determined that further evidence must be adduced at rehearing and have, therefore, remanded certain issues. Insofar as the record addressed so far in this proceeding is concerned, we conclude for reasons stated above that Judge Cograve's findings and conclusions were proper and well-founded as to all allegations of violations of section 16 of the Shipping Act with respect to the carrier and forwarder and section 17 of the Shipping Act with respect to the carrier.

However, there remain two issues which we are unable to determine on the record of this proceeding. The allegations of Hipage's dereliction in failing to notify the shipper of any disputes as to applicable tariff rates may not be decided on the unclear record before us. We, therefore, have determined to remand this issue in order to clarify the record in this regard.

Additionally, with respect to the alleged violation of 18(b)(3) by Respondent Prudential we have determined to order further hearing in order to determine the proper tariff rate to be applied to the goods shipped. This determination sould include consideration of tariff items no. 1198, no. 0101, the Cargo, NOS rate, and whatever other rates may properly be considered.

Vice Chairman Morse concurring:

I concur in the result but in so doing I find it unnecessary to concur in the statements of the majority that there must be a competitive relationship proved in this type of case to establish a violation of sections 16 and 17, Shipping Act, 1916. *Volkswagenwerk v. FMC*, 390 U.S. 261, 280 (1968).

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 74-8

EUROPEAN TRADE SPECIALISTS, INC. AND KUNZLE & TASIN

v.

PRUDENTIAL-GRACE LINES, INC. AND THE HIPAGE CO., INC.

ORDER ON REMAND

These proceedings having been instituted upon complaint filed under section 22 of the Shipping Act, 1916, and the Commission having this date made and entered its Report containing its findings and conclusions thereon, which Report is made a part hereof by reference:

IT IS ORDERED, That the issues relating to the alleged dereliction of Respondent Hipage Company in failing to notify its shipper of any dispute as to the applicable tariff rate in violation of section 17 of the Shipping Act, 1916, be and hereby are, ordered to be remanded for further hearing consistent with our Report; and

IT IS FURTHER ORDERED, That the issues relating to the alleged violation of section 18(b)(3) of the Shipping Act, 1916, by Respondent Prudential-Grace be and hereby are remanded for further hearings in order to determine the proper tariff rate to be applied to the cargo at issue with appropriate considerations being given to tariff items No. 1198, No. 0101, the Cargo, N.O.S. rate or any other rates which may be properly considered; and

IT IS FURTHER ORDERED, That those portions of these proceedings determined in our Report and not remanded by this Order for further proceedings be, and hereby are, discontinued.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 339(I)

UNION CARBIDE INTER-AMERICA, INC.

v.

VENEZUELAN LINE

NOTICE OF DETERMINATION NOT TO REVIEW

June 2, 1976

Notice is hereby given that the Commission on June 2, 1976, determined not to review the decision of the Settlement Officer in this proceeding served May 27, 1976.

By the Commission.

(S) JOSEPH C. POLKING,
Assistant Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 339(I)

UNION CARBIDE INTER-AMERICA, INC.

v.

VENEZUELAN LINE

Reparation denied.

DECISION OF JUAN E. PINE, SETTLEMENT OFFICER[1]

Union Carbide Inter-America, Inc. (complainant) claims $791.01 as reparation from Venezuelan Line for an alleged freight overcharge on a shipment carried from New York, New York to Puerto Cabello, Venezuela via the MARACAIBO on Bill of Lading No. 61 dated September 25, 1974. While the complainant does not specifically allege a violation of the Shipping Act, 1916, it is presumed to be Section 18(b)(3).

The carrier denied the claim solely on the basis of Rule 11, United States Atlantic & Gulf-Venezuela and Netherlands Antilles Conference Freight Tariff F.M.C. No. 2, which time-bars claims for adjustments not received by the carrier within six months from the sailing date of the vessel.[2]

The shipment consisted of 22 pallets totalling 880 bags of Synthetic Resin Polyethylene weighing 46,090 pounds, (44,880 pounds net) measuring 1,360 cubic feet, and having an invoice value of $15,950. Venezuelan Line assessed a bill for total freight charges of $2,759.59 which Union Carbide paid. These charges were computed from the above conference tariff. The carrier assessed a Class 1W rate from 5th Revised Page 122–A covering Synthetic Resins, N.O.S., in bulk in bags, actual value over $650 but not over $1,000 per 2,000 pounds. This rate was $116.50 per ton of 2,000 pounds assessed on $\frac{44,880}{2,000} = 22.44$ short tons, which produced ocean freight revenue of $2,614.26 plus accessorial charges of $201.43

[1] Both parties having consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2] The Commission has ruled that a claim filed within two years from the date the cause of action arose must be considered on its merits. *Colgate Palmolive Company* v. *United Fruit Company*, Informal Docket No. 115(I), served September 30, 1970. The bill of lading here is dated September 25, 1974 and the claim was filed November 17, 1975.

assessed on a weight ton basis,[3] minus a prepalletized cargo discount of $2.50 per weight ton amounting to $56.10, resulting in total freight charges assessed of $2,759.59.

Complainant bases his computations on Item 495 of the above tariff which contains a specific rate of $76.25 per ton of 2,000 pounds on Resins, Synthetic, in bags, Polyethylene, actual value over $500 but not over $700 per *2,000 pounds*. (26th Revised Page 62) In order to develop the actual value of the shipment of 46,090 pounds, the pallet weight of 22 pallets weighing 55 pounds each, totalling 1,120 pounds was subtracted therefrom resulting in a weight of 44,880 pounds. The shipment consisted of $\frac{44,880}{2,000} = 22.44$ tons of 2,000 pounds. The value per ton of $710.78 per 2,000 pounds is greater than $700 so the claim as submitted is incorrect. Claimant apparently, as the carrier alleges, used the gross weight of 46,090 pounds. This resulted in the use of the weight of the pallets in computing cargo valuation, i.e., $\frac{46,090}{2,000} = 23.045$ tons of 2,000 pounds.

The invoice value divided by the above $\frac{\$15,950}{23.045}$ results in a valuation per ton of $692.12 which decreases the actual value of the cargo. The weight of the pallets should not be included in the weight of the cargo to arrive at actual value.

The claim for reparation is denied.

The carrier responded in this proceeding on December 11, 1975 that the correct value on the basis of the cargo as freighted should be $710.78 per ton of 2,000 pounds. I concur with respect to this higher value per ton. Item 2(L) of the subject tariff provides:

> "Wherever different rates or ratings according to the value of a commodity are provided herein, it shall be understood that the value specified in writing by the shipper, is the actual value per ton of 40 cubic feet or 2,000 pounds, as cargo is freighted. The lower basis is available only where the actual value of such commodity does not exceed the limitation indicated."

The carrier further countercharges that the following description and rate under Item 495 (26th Revised Page 62) should apply: Synthetic Resins, N.O.S. *in other packing:* actual value over $500.00 but not over $700.00 per freight ton—$94.75 per ton of 40 cubic feet or 2,000 pounds, whichever is the greater. The carrier would compute the charges under the above description as follows:

[3] The exception to the weight ton basis is the charge of three cents per package assessed on all shipments to Venezuela per tariff Item 9 entitled "ADDITIONAL CHARGES."

"Calculating the valuation on the basis of 1,360/0 cubic feet less 10% Pallet Allowance per Item 26, the total cubic feet should be 1,224/0, the valuation is $521.24 per cubic feet and the rate should have been $94.75/40 cft. The correct charges are:

1,224/0 @$94.75	$2,889.35
Bunker Surcharge @$4.80	146.88
Port Congestion S/C @$3.00	91.80
Less Pallet Discount @$2.50	[−76.50]
Pkg. charge on 880 bags @3¢	26.40
Correct Charge	$3,087.93
As billed	2,759.59
Undercharge	$ 328.34

Complainant will be billed for the undercharge shown above."

I do not agree with the carrier's expressed intent, in its December 11, 1975 rebuttal of the claim, to bill for an undercharge on this shipment. Such a billing would be based on the commodity description Synthetic Resins, N.O.S. *in other packing*.

The original commodity description on the Bill of Lading—880 *bags* of Synthetic Resin Polyethylene is specific as to packing. This description is found on 5th Revised Page 122–A—Synthetic Resins, N.O.S. *in bulk in bags:* actual value over $650 but not over $1,000 per 2,000 pounds—class 1W ($116.50).

In *United States v. Gulf Refining Company, 268 U.S. 542, 546 (1925),* it was held that "When a commodity shipped is included in more than one tariff designation, that which is more specific will be held applicable. And where two descriptions and tariffs are equally appropriate, the shipper is entitled to have applied the one specifying the lower rate."

The latter more specific description also results in lower transportation costs to the shipper.

Under these circumstances any billing over the $2,759.59 paid by claimant to the carrier would be in violation of Section 18(b)(3) of the Shipping Act, 1916.

The initial charges assessed by the carrier were correct, reparation is denied claimant, and any attempt for additional billing on this shipment by the carrier, based on the information in this proceeding, would be contrary to the Shipping Act, 1916, as indicated above.

(S) JUAN E. PINE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET 479

THE BUCKEYE CELLULOSE CORPORATION

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

June 9, 1976

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on June 9, 1976.

It is Ordered, That applicant is authorized to waive collection of $560.00 of the charges previously assessed Buckeye Cellulose Corp.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 479 that effective October 24, 1975, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from October 24, 1975 through December 15, 1975, the rate on 'Woodpulp Chemical' from Charleston, South Carolina (minimum 20 WT per container) is $50.00 W, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 479

THE BUCKEYE CELLULOSE CORPORATION

v.

SEA-LAND SERVICE, INC.

Adopted June 9, 1976

Application granted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

Sea-Land Service, Inc., has applied for permission to waive collection of a portion of the freight charges on a shipment by Buckeye Cellulose Corporation. The shipment was 84,500 lbs. of "Woodpulp, chemical" which was carried by Sea-Land from Charleston, South Carolina, to Barcelona, Spain, under a Sea-Land bill of lading dated October 31, 1975. The rate applicable at the time was $64.00 per 2,240 lbs. (Sea-Land Freight Tariff No. 168–B, Item 17850, 9th Revised Page 192). Total freight charges under the $64.00 rate were $2,581.13. The rate sought to be applied is $50.00 per 2,240 lbs. which would result in total freight charges of $2,021.13. Permission to waive the collection of $560.00 is sought.

In order to meet the rates of the competition from South Atlantic ports to Spanish ports, Sea-Land's sales representative in St. Louis, Missouri, and Buckeye negotiated a rate of $50.00 per long ton, minimum 20 tons per container, on chemical woodpulp from Charleston to Barcelona. The negotiations centered around a two containerload shipment which was to connect with a Sea-Land sailing scheduled for October 24, 1975. The $50.00 rate was accepted and a teletype confirming that fact and requesting immediate publication was sent on October 15, 1975, by the St. Louis representative to Sea-Land's Mediterranean Pricing Division.

Actual publication should have been made in Item 17850 in Sea-Land's Tariff 168–B, FMC–73, which would have made the $50.00 rate applicable to Spanish ports. However, through clerical error "the tariff publishing officer instructed publication to ports in France and Italy instead of

[1] This decision became the decision of the Commission June 9, 1976.

Spanish ports. Thus Item 8200 of Tariff 168–B not the intended Item 17850 was amended leaving in effect the $64.00 rate from Charleston to Barcelona. The Buckeye shipment left Charleston on October 31, 1975, and since the error had not been discovered, the Sea-Land bill of lading (975–445414–16) was freighted at the $64.00 rate with the resultant aggregate charges of $2,581.13. Buckeye, however, paid the freight on the basis of the promised $50.00 rate (total $2,021.13) and this apparently led to the discovery of the error. The error was corrected on December 15, 1975, by amending Item 17850 through the filing of 9th Revised Page 192 of Tariff 168–B. In urging that the application be granted Sea-Land says that the "Erroneous publication of the negotiated rate to ports in France and Italy instead of ports in Spain was the result entirely of [the] clerical mistake on [the] part of respondent's pricing personnel."

Sea-Land knows of no other shipments of the commodity for the time involved.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[2] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[3] states the *Purpose of the Bill:*

[2] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

[3] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges,* under *Purpose of the Bill.*

[Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

The type of clerical error here involved is the kind that can be remedied under section 18(b)(3) and the application should be granted.

It is therefore found that:

1. There was a tariff error due to inadvertence;

2. Granting permission to waive collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for permission to refund a portion of the freight charges, Sea-Land filed a new tariff setting forth the rate upon which the waiver is to be based; and

4. The application was filed within 180 days of the date of shipment.

Accordingly, Sea-Land is permitted to waive collection of $560.00 from the Buckeye Cellulose Corporation.

An appropriate notice will be published in the tariff of Sea-Land.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
May 18, 1976.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 475

THE GOODYEAR TIRE & RUBBER CO.

v.

DELTA SEAMSHIP LINES, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND OF CHARGES

June 9, 1976

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on June 9, 1976.

It is Ordered, That applicant is authorized to refund $1,469.60 of the charges previously assessed Goodyear Tire & Rubber Co.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 475 that effective January 1, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from January 1, 1976 through January 21, 1976, the rate on 'Coal Tar (non-hazardous)' is $133.50 W/M, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That refund of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 475

THE GOODYEAR TIRE & RUBBER CO.

v.

DELTA STEAMSHIP LINES, INC.

Adopted June 9, 1976

Application for refund granted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

Delta Steamship Lines has made application to refund a portion of the freight charges collected from The Goodyear Tire & Rubber Co. on a shipment of Coal Tar, Non-hazardous carried aboard the *Delta Sud* from Houston, Texas, to Santos, Brazil.

The shipment of coal tar which moved under a Delta bill of lading dated January 9, 1976,[2] weighed 72,823 pounds and measured 2,672 cubic feet. The aggregate freight charges collected for the shipment were $11,055.40. The basis for the aggregate freight was the Cargo N.O.S. rate of $155.50 W/M found in the Inter-American Freight Conference Tariff, Sec. A—F.M.C. No. 11.

This application requests permission to apply a rate of $133.50 W/M which would result in aggregate freight charges of $9,585.80 and a refund to Goodyear of $1,469.60. In support of its request for refund applicant states:

"COAL TAR (Non-Hazardous)" was, through Administrative error, inadvertently omitted from our revised freight tariff F.M.C. 11, Page No. 165, which became effective January 1, 1976. The item had been carried in previous tariffs for more than 20 years. On discovery of the omission, the description was reinstated in the tariff effective January 21, 1976 as per copy of tariff Correction No. 64 attached. There are also attached copies of original Page No. 165 reflecting the omission. There are also attached copies of 32nd Revised Page No. 172 to our tariff F.M.C. No. 7 reflecting the inclusion of this item in the previous tariff just prior to its reissuance, copies of the paid freight bill, the ocean bill of lading covering the shipment on which this application is based and

[1] This decision became the decision of the Commission June 9, 1976.

[2] Through error the wrong bill of lading was attached to the application. This error was corrected and the proper bill of lading is now a part of the record.

1st Revised Page No. 21 to I.A.F.C. Tariff F.M.C. No. 11 reflecting the Bunker Surcharge in effect at time the shipment moved.

We have verified with all members of the Inter-American Freight Conference—Section A they either had no sailing during the period in question or carried no Coal Tar (Non-Hazardous) shipments, other than that covered by this application. Effective Jan. 1, 1976 there was a general rate increase of approximately 5.5% which accounts for the difference between the rate in effect last Dec. $127.00 W/M and $133.50 W/M.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment.

Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[3] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[4] states the *Purpose of the Bill:*

[Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

The administrative error by which applicant inadvertently omitted the Coal Tar item is clearly the kind of relief contemplated under section 18(b).

It is therefore found that:

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[3] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

[4] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges*, under *Purpose of the Bill.*

1. There was an administrative error due to an inadvertence in failing to include the specific commodity item Coal Tar (Non-hazardous) in the reissued tariff;

2. Such refund will not result in discrimination among shippers;

3. Prior to applying for authority to refund a portion of the freight charges, Delta Steamship Lines, Inc., filed a new tariff which set forth the rate on which the refund would be based; and

4. The application was filed within one hundred and eighty days from the date of shipment.

Accordingly, the Delta Steamship Lines, Inc., will be permitted to refund $1,469.60 to the Goodyear Tire & Rubber Co.

An appropriate notice will be published in the tariff of the Delta Steamship Lines, Inc.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
May 13, 1976.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 477

WYANDOT EXPORTING CO.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

June 9, 1976

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on June 9, 1976.

It is Ordered, That applicant is authorized to waive collection of $196.36 of the charges previously assessed Wyandot Exporting Co.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 477 that effective October 15, 1975, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from October 15, 1975, through October 17, 1975, the rate on 'Popcorn, Raw, Off Ear, in bags or cases' is $64.50 W, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 477

WYANDOT EXPORTING CO.

v.

SEA-LAND SERVICE, INC.

Adopted June 9, 1976

Application granted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

Sea-Land Service, Inc., seeks permission to waive collection of a portion of the freight charges on a shipment, Popcorn, Raw, Off Ear, in bags or cases, weighing 44,440 lbs. which was carried by Sea-Land from Elizabeth, New Jersey, to Valencia, Spain.

From the application it would appear that when Sea-Land's sales representative was soliciting the export shipments of Wyandot Exporting Company, he was told on October 9, 1975, of a shipment ready to move to Valencia, Spain. Wyandot agreed to let Sea-Land have the shipment if it met a rate of $64.50 per ton offered Wyandot by a competing carrier. The rate in effect at the time was $75.50 per ton less 10 percent house-to-house discount. (Sea-Land Tariff No. 166, FMC–43, Item 6480, 11th Revised Page 106.)

Sea-Land's next sailing to Valencia was the *S.S. Los Angeles,* Voyage 113–E, then scheduled to sail from Elizabeth on October 14, 1975. On October 9, 1975, the sales representative got approval of the $64.50 rate by phone from Sea-Land's Mediterranean Pricing Division. The sales representative requested an effective date of October 13, 1975. At 1:30 P.M. on October 9, 1975, the sales representative confirmed by teletype the phone request and the Mediterranean Pricing Division's agreement to the $64.50 rate. However, the sales representative failed to include in the message the proposed effective date of October 13, 1975. Sea-Land describes what happened next:

[1] This decision became the decision of the Commission June 9, 1976.

Administrative oversight by the Pricing Division in failing to process promptly the request for publication and filing of the agreed rate with this Commission, and clerical failure to recall and attach to it the verbal request for effective date of October 13, resulted in delay until Tuesday, October 14, of formal publication instructions to Sea-Land's tariff publishing officer. Not knowing that the proposed rate was meant to be effective for a sailing scheduled for that same day, the tariff publishing officer followed his normal procedure by filing the reduced rate to become effective in time for the next sailing, then scheduled for October 21. Filing was made on October 17, 1975 by teletype to Branch I. (Item 6480 on 12th Revised Page 106 to Tariff No. 166, FMC–43.)

Unaware of the failure to secure the October 13, 1975, effective date for the $64.50 rate, Wyandot forwarded the shipment and it was loaded on board the *S.S. Los Angeles* on October 15, 1975, and the ship sailed the same day. The Sea-Land bill of lading covering the shipment freighted at the $75.50 per ton less 10 percent rate and the aggregate freight charges of $1,348.08 were computed on that basis. Wyandot, however, recalculated the charges using the promised $64.50 rate and paid a total charge of $1,151.72. The "short-payment" of $196.36 was discovered during processing "through accounting and rate review channels," and this led to the further discovery of the failure to secure the October 13, 1975, effective date.

Thus as Sea-Land puts it, ". . . late publication of the reduced rate per ton was the result entirely of [Sea-Land's] administrative failure to promptly process a tariff publication when time was of the essence, compounded by a clerical failure to include in the publication instructions the effective date that was specifically desired."

No other Special Docket Applications involving this rate situation have been filed and Sea-Land knows of no other shipments of the same commodity during this period from other shippers.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping

Act (Public Law 90-298)[2] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[3] states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

Quite obviously the administrative and clerical oversight set out above is of the kind contemplated by section 18(b)(3). The application should be granted.

It is therefore found that:

1. There was a tariff filing error due to inadvertence;
2. The granting of the requested waiver will not result in discrimination among shippers;
3. Prior to applying for permission to waive the collection of a portion of the freight charges Sea-Land filed a new tariff setting forth the rate upon which the waiver is to be based; and
4. The application was filed within 180 days of the date of shipment.

Accordingly, Sea-Land is granted permission to waive the collection of $196.36 from Wyandot Exporting Company.[4]

An appropriate notice will be published in the tariff of Sea-Land.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
May 18, 1976.

[2] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

[3] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges*, under *Purpose of the Bill.*

[4] Curiously enough, but without relevance to granting it, Wyandot was unaware of the application of Sea-Land to waive collection of the monies. (See letter from Wyandot to me dated April 20, 1976.)

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-11

INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION - SEQUOIA FORWARDERS COMPANY

Applicant for an ocean freight forwarder license found to be independent of shipper or consignee interests as required by section 1 of the Shipping Act, 1916. Application granted.

Robert T. Basseches for Applicant.

John Robert Ewers and *Joseph B. Slunt* as Hearing Counsel.

REPORT

June 16, 1976

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett, Bob Casey and James V. Day, *Commissioners*)

This proceeding was instituted by the Commission to determine whether the common ownership of Sequoia Forwarders Company (Sequoia), an applicant for an independent ocean freight forwarder license, and Cal-West Produce Enterprises (Cal-West), a produce broker for a client engaged in the movement of produce in the export commerce of the United States, by third parties, leaves Sequoia in the position of independence from shippers as required by section 1 of the Shipping Act, 1916 (the Act).[1]

Hearings were held and Administrative Law Judge William Beasley Harris has issued an Initial Decision in which he denied Sequoia's application for a license. Applicant has filed exceptions to the Initial Decision to which Hearing Counsel have replied. We heard oral argument.

FACTS

The relevant stipulated facts are essentially as follows.

Two individuals who equally own Sequoia, a partnership established in

[1] Section 1 of the Act defines an "independent ocean freight forwarder" as:

. . . a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest.

1974, also equally own Cal-West, a corporation. Cal-West acts solely as a licensed produce broker under the Perishable Agricultural Commodities Act, 1930.[2] In such capacity approximately 20 to 25 percent of Cal-West's time is spent as the broker of fresh produce for American Foods, A.B. (American Foods), a Swedish company which purchases produce from the United States for consumption in Sweden.[3] Neither Cal-West nor American Foods has any financial or proprietary interest in one another.

Except for the price of lettuce produce, Cal-West generally includes its brokerage in the agreed sales price and its brokerage fee is not identified as a separate charge on the invoice. Cal-West's principal (American Foods) pays the invoice amount, including brokerage directly to the seller who in turn remits the brokerage fee to Cal-West.

While Cal-West has complete freedom to search out various sellers of produce to determine what produce are available, it has no leeway with respect to price and quantity on produce that meet the requirements of American Foods and have subsequently become the subject of negotiations between Cal-West and the American supplier of produce. These two requirements are firmly dictated by American Foods through almost daily communications with Cal-West although there is no continuing contract between them.

During the negotiations on contracts for produce the seller is aware that Cal-West is acting only as a broker for American Foods and not as a purchaser or seller for Cal-West's own or joint account. Accordingly, the seller invoices the purchase price directly to American Foods. Cal-West never guarantees the performance of American Foods nor otherwise shares in the risk of sale; in fact, unless specifically agreed Cal-West assumes no responsibility for payment of the seller's invoice. Further, Cal-West never advances its own funds for payment of such invoices nor does it retain any common law or statutory lien or interest in the produce contracted for.[4]

In addition to negotiating on behalf of American Foods, Cal-West will inspect the produce purchased to insure quality, and when requested, arrange overland transportation for the produce, in American Foods' name, from the seller's storage area. For these services Cal-West is paid the uniform industry brokerage fee of 10 cents for each box of produce subject to the contract. Under Department of Agriculture regulations, such brokerage fee is earned by Cal-West, once a written confirmation of sale has been executed, whether or not the contract is performed.

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[2] This statute authorizes produce brokers, such as Cal-West, to be:

. . . engaged in the business of negotiating sales and purchases of any perishable agricultural commodity in interstate or foreign commerce for or on behalf of the vendor or the purchaser, respectively. . . . (7 U.S.C. §499(a)(7)).

[3] Of the dozen foreign consignees for which Cal-West acts as a produce broker only American Foods utilizes ocean transportation in the foreign commerce of the United States.

[4] Cal-West never physically takes possession of the produce nor does its name appear on either the invoice covering the sale of produce (except as broker) or on the bill of lading.

INITIAL DECISION

In denying Sequoia's application for a license, the Presiding Officer first rejected all arguments of both parties relating to the legislative history of the freight forwarder legislation and, specifically, to that portion of the legislative history dealing with the "independence" requirement of section 1 of the Act, on the stated grounds that such arguments "have been disposed of by the *Zanelli* case",[5] and that therefore, "any further consideration, discussion or suggestion . . . would cloud rather than clarify the matter."

The Presiding Officer next addressed the matter of whether Applicant here, Sequoia, possessed the requisite independence from shipper interests to qualify it for a freight forwarders license. After reciting the conflicting positions taken by the parties the Presiding Officer summarily concluded that he:

> . . . agree[d] with the position and reasoning of Hearing Counsel, and such other reasons as given,[6] in finding that Cal-West is an agent for a consignee, and, as such, Cal-West is not "independent" nor will be "independent" within the meaning of section 1 of the Act.[7] (Footnotes Added)

POSITION OF THE PARTIES

Sequoia excepts to the denial of its application for a license, taking issue with the Presiding Officer's conclusion that Sequoia is not "independent" within the meaning of section 1 of the Act. Its arguments, for the most part, are but recapitulations of arguments advanced before the Presiding Officer.

Sequoia first argues that if the Presiding Officer had not ignored the legislative history of the freight forwarder law, he would not have misinterpreted the court's opinion in *Zanelli*. Sequoia contends that, had

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[5] *Hugo Zanelli d/b/a Hugo Zanelli & Co.*, ... F.M.C. ..... (1974), 14 S.R.R. 1266, *Aff'd per curiam* in *Zanelli v. Federal Maritime Commission*, 524 F.2d 1000 (5th Cir. 1975).

[6] The "other reasons given" appear to relate to his collateral findings that: (1) Sequoia has been conducting freight forwarding operations prior to submitting its present application; (2) the license application was being filed as a result of dissatisfaction with existing West Coast freight forwarding service; and (3) Sequoia's request for a license is not intended to serve the best interests of the public. We agree with Hearing Counsel that these findings "are beyond the issue set for hearing and are not related to the decision on the one issue properly before the Administrative Law Judge." They will accordingly be disregarded as irrelevant.

[7] In their brief before the Presiding Officer, Hearing Counsel took the position, *inter alia*, that Applicant could not be licensed as an independent ocean freight forwarder because its alter ego, Cal-West, "acts as a purchasing agent for a consignee and purchaser of shipments moving to foreign countries by oceangoing common carriers" contrary to the independence requirement of section 1 of the Act. In support of this proposition Hearing Counsel referred to the court's opinion in *Zanelli*, wherein it was stated that:

> . . . an independent ocean freight forwarder *cannot hold such a license if he acts as* a shipper, *agent for a consignee*, seller, financier, or has obtained a beneficial interest in the goods shipped. (emphasis theirs).

Hearing Counsel viewed this language as acknowledging a congressional intent that a forwarder be "absolutely independent" and precluding Cal-West's activities here.

Hearing Counsel also relied on the change in language between the earlier definition of the term "foreign freight forwarder" and that finally adopted, noting that while the earlier definition would have specifically allowed various persons including "resident buyers [and] brokers," to be licensed as "foreign freight forwarders," the legislation finally adopted excluded such persons.

The reason for this "absolute independence" requirement, Hearing Counsel explained, was because Congress was intent on "not only halting the payment of rebates but also defining the role of forwarders and setting standards for industry." Hearing Counsel was of the opinion that the licensing of Sequoia under the circumstances presented here would pave the way for possible rebating and other potential abuses the licensing provisions were intended to prevent.

the Presiding Officer reviewed the purpose and intent of the freight forwarder laws, he would have realized that the court, in *Zanelli*, was only restating the congressional mandate that only when an applicant fits within any of the statutorily prohibited categories of section 1 is the bar to licensing absolute. Applicant points out that when Congress adopted the language of section 1, it did so with the express purpose of prohibiting the refunding of brokerage to shippers in those situations where there existed a close ownership or control relationship between the shipper and the forwarder, and was, in effect, setting forth categories of relationships which in and of themselves would remove the "independence" necessary to be a licensed freight forwarder. Sequoia concludes that since the facts of record here do not establish Cal-West as fitting into any of the proscribed categories of section 1, it has satisfied the independence requirement and should be licensed.

Hearing Counsel, in their reply to exceptions, take the position that the Presiding Officer was correct in denying Sequoia's freight forwarder license application. In supporting the ultimate determination reached in the Initial Decision as proper and well-founded, Hearing Counsel put forward much the same contentions as they did in the proceeding below. Thus, Hearing Counsel argue that the "absolute independence" requirement of section 1 is a complete bar to the licensing of "brokers or purchasing agents," such as Cal-West/Sequoia. This position, Hearing Counsel resubmit, is supported not only by the decisions of the court and this Commission in *Zanelli* but by the legislative history of the freight forwarder legislation as well.

Hearing Counsel again voice their opinion that "the relationship between Cal-West and American Foods could lead to the very type of indirect rebates Congress sought to bar by the legislation." Cited as an "example" is the possibility that Cal-West could, in consideration of the ocean freight brokerage which Sequoia would receive as a freight forwarder on American Foods' shipments, reduce the fees it earns as a produce broker and funnel indirect rebates to American Foods. Also of concern to Hearing Counsel is the possibility that Sequoia would aid Cal-West and/or American Foods in competing with other purchasers who give their forwarder business to Sequoia.

Hearing Counsel further submit that Sequoia should not be allowed to minimize the control aspects existing between American Foods and Cal-West.[8] In this regard, Hearing Counsel submit that while, in theory, Cal-West may refuse to act for American Foods, in practice, American Foods has economic control over Cal-West beyond that conferred by the actual agency agreement since Cal-West is dependent upon American Foods for

[8] Sequoia argued that since American Foods has no stock or proprietary interest in Cal-West and since Cal-West is not subject to any continuing contractual obligation to American Foods, "control" does not exist in the statutory sense of section 1 of the Act. In short, Sequoia submits that the direction given by American Foods to Cal-West with respect to price and quantity of produce is not the kind of control which can lead to indirect rebates, if Sequoia were licensed.

a major portion of its income. As a result, it is inconceivable to Hearing Counsel that Cal-West will not take into consideration the ocean brokerage paid to Sequoia in setting its fee to be charged American Foods.

Finally, Hearing Counsel point out that since Department of Agriculture regulations governing produce brokers (7 C.F.R. 46.27 and 46.28) make it clear that a produce broker acts as an "agent" for the buyer of produce, it would be impossible for Sequoia not to violate section 510.24(c) of General Order 4, considering the common ownership between it and Cal-West.[9]

Discussion and Conclusions

As the parties here have stipulated, "the proceeding presents a single issue: Whether Sequoia, if granted a license, would be an 'independent ocean freight forwarder' as defined in section 1 of the Shipping Act."[10] On the basis of the record before us and for reasons stated below, it is our opinion that Sequoia is in fact and in law "independent" of shipper and consignee interests, as required by section 1 of the Act, and, accordingly, qualified to be licensed as an ocean freight forwarder by this Commission.

The legislative history of the bill which ultimately became section 44 of the Act makes it clear that Congress established the independence requirement for forwarders to prohibit those categories of relationships which, in and of themselves, could be presumed to give rise to an illegal rebate. In fact, Congress acknowledged that a forwarder could conduct nonforwarding activities for shippers, consignees and other persons, delineated in section 1 of the Act, provided that such activities did not affect the forwarder's independence. The Commission itself allowed licensed forwarders to perform certain services for their shipper-clients.[11]

In support of their basic position that "Cal-West's activities may not be performed by an independent ocean freight forwarder," Hearing Counsel make much of the fact that while an earlier version of the freight forwarder legislation expressly included among the types of entities allowed to function as freight forwarders "resident buyers, brokers, [and] commission merchants," the final version did not address these activities specifically. Hearing Counsel view this drafting change as providing the

[9] 510.24(c) of General Order 4 (46 C.F.R. 510.24(c)) provides that:

No licensee shall share, directly or indirectly, any compensation or freight forwarding fee with a shipper, consignee, seller, purchaser, or their agents, affiliates or employees; nor with any person or persons advancing the purchase price of the merchandise or guaranteeing payment therefor; nor with any person or persons having beneficial interest in the shipment.

[10] The parties have further stipulated, and we have no basis to disagree, that subject to this issue, "Sequoia is fit, willing, and able properly to carry on the business of forwarding."

[11] *Bolton & Mitchell, Inc.*; 15 F.M.C. 248 (1973), *Report on Reconsideration*, 16 F.M.C. 284 (1973); *Aff'd on rehearing, Bolton & Mitchell, Inc.*, Supplemental Report, ____ F.M.C. ____ (1973), 14 S.R.R. 179; *Aff'd on rehearing, Second Supplemental Report*, ____ F.M.C. ____ (1974), 14 S.R.R. 750; *Denial of Petition for Reconsideration*, ____ F.M.C. ____ (1975), 16 S.R.R. 87; *Hugo Zanelli & Co., supra*, at note 5. See also Commission *Circular Letter REF. DFF-2*, dated April 29, 1965, which in effect, allows forwarders to become resident buyers for foreign consignees provided they acquire no beneficial interest in the goods shipped.

"clearest indication" of Congress' intention that "these activities were no longer allowed to be performed by forwarders". We are not so convinced.

The legislative history of the freight forwarder amendment fails to indicate why the earlier approach was abandoned. Certainly, there is no evidence that the intent of the change in language, which Hearing Counsel views as so significant, was to preclude the licensing of the entities listed in the earlier bill. Indeed, it is equally as likely that the earlier approach was rejected in favor of that finally adopted because the Congressional draftsmen realized the problems inherent in attempting to enumerate a host of particularized activities, lest one be omitted that should be included. For whatever reason Congress went from the more specific listing of job titles to a more generic approach to the matter, the fact remains that the change in approach is absolutely inconclusive as an indication of the drafters' intent.

Hearing Counsel's reliance on the *Zanelli* decisions as support for its proposition that Sequoia is not "independent" within the meaning of section 1 of the Act is equally misplaced. Both Hearing Counsel and the Presiding Officer apparently misinterpret the standard of "absolute independence" required by section 1 of the Act and explained in the *Zanelli* case. The *Zanelli* case does not stand for the proposition that *every* agency or other relationship between a forwarder and an export shipper is proscribed by the independence requirement of section 1 of the Act. The statutory requirement of "absolute independence", discussed in *Zanelli*, is "absolute" only to the extent it "absolutely" bars the licensing of any applicant whose activities cause it to be included in one of the prohibited categories of section 1 of the Act. It is not a standard requiring an applicant to be "absolutely independent" of shipper interests, as the Presiding Officer would apparently have it. That the section 1 independence requirement does not preclude all relationships between forwarders, on the one hand, and shippers and consignees, on the other, was specifically made clear by the court in *Norman G. Jensen v. F.M.C.*, 497 F.2d 1053 (CA 8th Cir. 1974).

In the *Jensen* case the court reversed the Commission's findings that Jensen, a licensed forwarder, was, by virtue of its connection with ITC, through common ownership and interlocking officers and directors, "shipper-connected" and, as a result, derived a beneficial interest from the fee paid ITC for rendering to its shipper-clients the following services: (1) making arrangements for transportation to the ports; (2) preparing export declarations, consular invoices and related documents; (3) receiving purchase orders and payment; (4) preparing commercial invoices and inventory reports; (5) investigating credit; and (6) selecting freight forwarders.

In rejecting the Commission's determination that, by reason of its relationship with ITC and ITC's activities, Jensen was "shipper-con-

nected" and, accordingly, did not have the requisite independence required by section 1 of the Act, the court explained:

> [The] conclusion that ITC is 'shipper-connected,' while possibly accurate depending on how the term is defined, lacks any significance. It is undisputed that ITC is connected with its shipper-clients because it does render services to them for a fee. Any forwarder, for that matter, who renders services to a shipper-client will be 'shipper-connected.' This association, however, would not affect Jensen's status as an independent ocean freight forwarder under the definition set forth in the Freight Forwarder Law even assuming, arguendo, that Jensen controlled, or was controlled by, ITC. Jensen's status, for that purpose, would be affected only if ITC was a shipper or consignee or a seller or purchaser of shipments to foreign countries, or had a beneficial interest in such shipments. [497 F.2d at 1057].

Since neither the language of section 1, its legislative history nor judicial interpretations of that section require that an applicant for a forwarders license be free of *all* shipper-connections, Sequoia is correct in defining the "issue" here as:

> . . . not whether Sequoia meets some abstract standard of "absolute independence", but rather whether it complies with the requirement of 'independence' as defined in the statute.

On this question, we concur with Sequoia that it does so comply.

The record before us does not indicate that Cal-West is either a "shipper", "consignee", "seller", or a "purchaser" of export shipments within the meaning of section 1 of the Act, or that it has any "beneficial interest" in such shipments. We find no support for Hearing Counsel's assertion that Cal-West, in its role of produce broker, is a "purchaser", as that term is commonly understood; particularly, since Cal-West obtains neither a common law nor a statutory lien in the produce purchased by American Foods. As regards Hearing Counsel's characterization of Cal-West as a "purchasing agent", it should be pointed out, as Sequoia has noted, that where the Commission has found a "purchasing agent" to lack the requisite independence, the forwarders involved had acquired a "beneficial interest" in the export cargo by virtue of their activities;[12] such a finding cannot be supported here. Thus, it is the conduct of the particular person or entity involved, and not its mere characterization as a "purchasing agent", which raises the statutory bar.

Further, there is no reason to believe that the arrangement between Cal-West and American Foods is such that American Foods "directly or indirectly" controls Cal-West within the meaning of section 1 of the Act. Cal-West and American Foods neither have employees in common, nor do they own stock or have a proprietary interest in, or a corporate connection with, one another. Clearly, the relationship between American Foods and Cal-West is not the type which the Commission has in the past

[12] *Bolton & Mitchell, Inc., supra*, note 11; *Hugo Zanelli & Co., supra*, note 11.

found to allow for the granting of illegal rebates, and therefore prohibited by section 1 of the Act.[13]

We are also not persuaded by Hearing Counsel's suggestions that Cal-West, in consideration of Sequoia's brokerage, would reduce its fee to American Foods. As Sequoia, in its exceptions pointed out, this theory was specifically rejected by the court in *Norman G. Jensen v. F.M.C., supra.* In disposing of the Commission's argument that ITC, in consideration of Jensen's brokerage, would reduce its fee to its shipper-clients, the court's pronouncement, which we find equally controlling here, was that:

> This same rationale would require the finding of a violation of §16 any time a shipper employs an ocean forwarder because it is more economical than maintaining its own forwarding staff. It would strain the words of the statute too far without furthering any of the objectives for which the Act was designed to serve to find a violation in this situation. [497 F.2d at 1059]

Equally of little consequence is the possibility, cited by Hearing Counsel, that Sequoia, if licensed, would use the confidential information obtained as a forwarder to the benefit of Cal-West and/or American Foods in competing with Sequoia's other shipper-clients. That Sequoia might engage in such activity is wholly speculative and of no probative value whatever in determining Sequoia's present independence under section 1 of the Act. In short, what an applicant *might* do, if licensed, is insufficient to justify the denial of a license if that applicant is otherwise qualified in fact and in law. Once licensed, however, the forwarder is subject to all the Commission's rules and regulations and any unlawful conduct or activity can be handled in an appropriate proceeding.

Finally, Hearing Counsel, in support of their contention that Sequoia cannot be licensed as a forwarder, rely in part on the language of section 510.24(c) of the Commission's Rules, which in essence, prohibits a forwarder from sharing directly or indirectly any compensation or forwarding fee with any shipper, consignee "or their agent, affiliates or employees."[14] Hearing Counsel take the position that since Cal-West is, admittedly, an agent of a shipper, (American Foods) and since there is common ownership between Sequoia and Cal-West, it would be impossible for Sequoia not to violate section 510.24(c). Thus, Hearing Counsel argue that if section 510.24(c) is to be consistent with section 1 of the Act, the prohibition against a forwarder being a purchaser also extends to its acting as an agent of the purchaser.

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[13] *Cleto Hernandez R. d/b/a Pan Inter-Freight Forwarder Application,* Docket No. 75-17, served March 9, 1976; *License No. 790–North American Van Lines,* 14 F.M.C. 215 (1971); *Speed Freight-Independent Ocean Freight Forwarder License No. 1092,* 14 F.M.C. 1 (1970); *York Shipping–Freight Forwarder Application,* 9 F.M.C. 72 (1965); *York Shipping Corporation–Freight Forwarder Application,* 9 F.M.C. 72 (1965); *Del Mar Shipping Co.–Freight Forwarder Application,* 8 F.M.C. 493 (1965); *Wm. V. Cady–Freight Forwarder Application,* 8 F.M.C. 352 (1964). It should also be realized that although the business of American Foods comprises 20 to 25 percent of Cal-West's business, American Foods is only one of a dozen consignees with whom Cal-West serves as a produce broker. This absence of exclusivity, while certainly not singularly determinative of Sequoia's independence, is another factor indicative of the independence of Cal-West/Sequoia.

[14] We should point out, at this juncture that section 510.24(c) was not intended to enlarge upon the statutory bars to licensing in the first instance but rather to govern a forwarder's activities once he is licensed.

The purpose of section 510.24(c) is to prevent illegal rebates by prohibiting a licensed forwarder from sharing any part of his revenue with a shipper or an agent thereof, since were he to do so the shipper would in effect be receiving a rebate. While Cal-West may be a special agent of American Foods under the Agricultural Commodities Act, we do not agree that it necessarily follows that this type of special agency is of the nature which would invoke the prohibition of section 510.24(c). Section 510.24(c) is directed at those agency arrangements which give rise to direct or indirect rebate to the shipper, *i.e.*, where the agent is *controlled* by his shipper or consignee principal. The arrangement at issue here does not present the type of "agency" to which section 510.24(c) was intended to apply, since, as we have already determined, there is no control exercised over Cal-West/Sequoia by the shipper, American Foods.

In conclusion, we find that Sequoia is independent within the meaning of section 1 of the Act and is otherwise fit, willing and able to carry on the functions of an independent ocean freight forwarder. Accordingly, its application for a forwarders license is hereby granted.

An appropriate order will be entered.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-11

INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION—SEQUOIA FORWARDERS COMPANY

ORDER

The Commission having fully considered the above matters and having this date made and entered of record a Report containing its conclusions and decisions thereon, which Report is hereby referred to and made a part hereof;

It is ordered, That the application for license of Sequoia Forwarders Company is hereby granted pursuant to section 44, Shipping Act, 1916.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 73-73

PORT OF HOUSTON AUTHORITY

v.

LYKES BROS. STEAMSHIP CO., INC., ET AL.

Complainant has failed to demonstrate that certain practices at the Ports of Galveston and Corpus Christi related to the handling of cotton cargoes, violate sections 16, 17 or 18(b)(3) of the Shipping Act.

F. William Colburn for Complainant, Port of Houston Authority.

Robert Eikel for Respondents, Lykes Bros. Steamship Co., Inc., *et al.*

Frank C. Brooks for Intervenor, Nueces County Navigation District No. 1.

Carl S. Parker for Intervenor, Board of Trustees of the Galveston Wharves.

REPORT

June 16, 1976

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett and James V. Day, *Commissioners*)*

This proceeding was initiated upon the complaint of the Port of Houston Authority (Houston)[1] against 28 carriers[2] serving the international cotton trade from the Texas ports of Houston, Corpus Christi, and Galveston (Respondents). The Board of Trustees of the Galveston Wharves (Galveston) and the Nueces County Navigation District No. 1 (Corpus Christi) intervened in the proceeding.[3]

The complaint charges that the Respondents stopped paying certain

*Commissioner Bob Casey not participating.

[1] The Port of Houston Authority is an agency of the State of Texas, charged with promoting, developing and preserving the waterborne commerce of the Port of Houston.

[2] Lykes Bros. Steamship Co., Inc., China Merchants Steam Navigation Ltd., Zim Israel Navigation Co., Ltd., Orient-Overseas Line, Inc., Nippon Yusen Kaisha Line, Ltd., Maritime Co. of the Philippines, Korean Shipping Corp., Charante T. & J. Harrison Ltd., Mitsui O.S.K. Lines, Ltd., Yamashita-Shinnihon Line, Waterman Steamship Corporation, Royal Netherlands Steamship Line, Hoegh Line, Blue Sea Line, Combi Line, Polish Ocean Line, Deppe Line Cie. Maritime Belge Lloyd Royal, Kawasaki Kisen Kaisha Line, Ltd., Atlantic Gulf Service, French Line, Trans-Sea Shipping Corp., Hellenic Lines, Ltd., Central Gulf Lines, Inc., DAFRA Line, Nervion Line, Turkish Cargo Line, Marchessini Line, and Barber Line.

[3] The Intervenors own and operate port terminal and harbor facilities at Galveston and Corpus Christi, Texas, respectively.

"heading" charges on shipments delivered to Houston after April 1, 1973,[4] but continued to make such payments at Galveston and Corpus Christi. This situation has allegedly caused cotton cargoes to be unfairly diverted from Houston to the other two ports and is claimed to be unduly prejudicial to Houston and unreasonably preferential to Galveston and Corpus Christi within the meaning of sections 16 and 17 of the Shipping Act, 1916 (Act). Houston also alleged that Respondent's payment of "heading" charges at Galveston and Corpus Christi violated section 18(b)(3) of the Act which forbids carriers to offer or extend services or privileges not stated in a duly filed tariff.

Administrative Law Judge Stanley M. Levy (Presiding Officer) issued an Initial Decision finding Respondents' selective payment of "heading" charges to violate sections 16, 17 and 18 of the Act. The proceeding is now before the Commission upon exceptions. We have heard oral argument.

FACTS

Cotton shipments at the three Texas ports involved in the instant controversy are handled in the following manner:

Houston

Prior to April 1, 1973, all export cotton cargo arriving at Houston was unloaded from overland conveyances by laborers employed and paid by the Port Authority. These laborers placed the cotton in the specified transit shed space adjacent to the vessel's assigned berth and stacked or headed the bales in the process. Shippers located *outside* of Harris County, Texas, paid Houston an "unloading" charge of $0.77 per bale for this service. Local cotton shippers did not pay any "unloading" charge. In addition, Houston's terminal tariff contained a $0.25 per bale "heading" charge which was payable by the carrier. Although not so stated in Houston's tariff, this charge was assessed only against bales arriving from compresses and warehouses *within* Harris County, Texas.

On April 1, 1973, the Port of Houston voluntarily discontinued its cargo handling and unloading services. These functions were assumed by private companies operating within the port area which refused to treat cotton bales differently from other cargoes by differentiating between local and non-local shippers. These companies issued tariffs which deleted "heading" charges entirely and assessed all cotton shippers or consignees an "unloading" charge of $0.70 per bale. "Unloading" includes all within port cargo handling from overland conveyance to the ship's assigned transit shed as well as initial *positioning of the bales within the shed.*

[4] Historically, "heading" meant the act of placing cotton bales on end so they could be readily hoisted aboard ship. More recently, "heading" has come to refer to all bale handling *subsequent to unloading* from the conveyance bringing the bales to the port area. This can include transportation to a transit shed and other within port movements as well as stacking, pyramiding, or heading (placing the bales on end) the cotton at its destination. "Heading" is used here in its broader sense.

Cotton is thus ordinarily headed (placed on end) in the transit shed at no cost to the carrier. Any further arrangement of the bales would be paid for by the vessel, however.

The record does not reveal when custody of export cotton shipments passes to the Respondents at the Port of Houston.

Galveston

Cotton received in rail cars is ordered directly to pier on ship's berth and unloaded by port authority employees. Galveston's published tariff lists an "unloading" charge for this service which is paid by the shipper. The rail car unloaders place the unloaded bales in a headed (on end) position, and no additional fee is assessed for this service. If space permits, the cotton remains where it is unloaded and there is no need for additional bale handling prior to loading aboard ship. When space limitations or other interests of the carrier require that the unloaded cotton be rearranged, this work is done by laborers known as "headers" who charge the carrier an hourly rate for their services.

A different procedure applies when a rail car contains bales with more than one shipper's mark. Such cars require additional segregation and drayage services, and separate segregation and drayage charges are assessed by Galveston against the shipper on all cotton other than the largest lot. The largest lot is treated in the same manner as a full car lot. The odd lots are segregated and if a lot is to be moved to another pier a local transfer company is engaged. The transfer company loads the bales on dollies pulled by tractors and delivers them to the second pier where it is received by a steamship company clerk and two "headers" employed by the carrier. The "headers" unload the dollies and the clerk issues the transfer company a receipt *after* it is unloaded.[5] If an odd lot is to be removed to a compress or warehouse instead of a pier, the transfer company drays it there at the warehouse's expense, but the shipper is still assessed the basic unloading charge and the additional segregation charge.

Most cotton delivered by truck arrives at Galveston's Cotton Receiving Lot, a loading/unloading area located some distance from the piers, where it is unloaded by Galveston employees. The "unloading" charge for trucks is the same as the charge for rail cars, *but also includes draying the cotton from the receiving lot to the ship's berth.* The shipper pays the "unloading" charge. Odd lot shippers pay an additional segregation charge, but not a drayage charge. At ship's berth the cotton is met by the carrier's clerk and its "headers," unloaded and receipted. Occasionally, trucks are allowed to proceed directly to ship's berth where they are unloaded by Galveston labor at the usual "unloading" charge without the assistance of carrier "headers." In such instances, however, the local Cotton Headers Union contract requires the carrier to pay its "headers"

[5] The transfer company's tractor driver generally assists the two "headers" in unloading the cotton, but is apparently not required to do so.

their usual per bale rate even though they do not do the work.[6] The carrier issues a receipt for the cotton after it is unloaded.

Cotton delivered from local warehouses arrives on tractor driven dollies and proceeds directly to ship's berth. It is handled by warehouse labor with the assistance of the two "headers" employed by the carrier and receipted by a steamship company clerk after it is unloaded. Galveston assesses no charges against cotton originating in local warehouses, but the "headers" receive their usual fee.

The record does not reveal when custody of export cotton shipments passes to Respondents at the Port of Galveston, although in most cases it seemingly occurs at approximately the time the carrier's clerk issues his receipt.

Corpus Christi

At Corpus Christi, export cotton arrives from places outside the port area by truck and rail car and arrives from local compresses by tractor-drawn dolly.

Rail cars stop on tracks adjacent to a warehouse or transit shed which is in turn adjacent to the vessel's berth space. The cars are usually spotted within 200 feet of the place or "pile" from which the bales are loaded aboard ship. Rail cotton is unloaded by laborers employed by a subcontractor of the Port who also move the bales to the pile and place them in a headed position. The subcontractor is always a stevedore and usually the same stevedore later employed by the carrier to load the cotton aboard ship. Under present billing practices, the stevedore bills the shipper directly at the rate specified in Corpus Christi's terminal tariff. Unloading includes moving the cotton from the rail car to the "pile" and the carrier pays no part of the "unloading" charge on rail cotton. Any further positioning of the bales is at the vessel's expense.

When export cotton arrives by truck, the truck is driven into a warehouse adjacent to the ship's berth and also unloaded by the Port's subcontractors. Charges for truck unloading are published by Corpus Christi and are again billed by the stevedore directly to the shipper. Once unloaded, truck cotton is moved from a paved driveway within the warehouse to the "pile" near ship's tackle and headed (placed on end) by the same men who unloaded the truck. These men are members of the local Cotton Headers Union, however, and their union contract calls for them to be paid separately for this "heading" work. The stevedore then bills the carrier directly for such "heading" services—at a current rate of $0.2026 per bale. Corpus Christi does not hold itself out to perform "heading" services, either with its own personnel or through subcontrac-

[6] The Cotton Headers Union is an affiliate of the International Longshoremens Association. In Galveston its members are paid a set fee of $0.1775 per bale for all cotton unloaded and positioned at ship's berth, except in the case of single mark bales unloaded from rail cars in headed positions. "Headers" are ordinarily employed by stevedoring companies who subcontract their labor to the carriers.

tors, and there is no charge or other reference in its terminal tariff for "heading" trucked cotton.

When the cotton arrives from local compresses, it is delivered to a warehouse adjacent to ship's berth by tractor-drawn dollies owned by the compresses and unloaded by laborers called "hookmen" who are employed and paid by the compresses for "hooking" the cotton off the dollies. Like cotton unloaded off trucks, the hooked bales are moved from the paved driveway to the pile by the same men who unloaded them, and the stevedore separately charges the carrier for this "heading" service at a rate of $0.2026 per bale. Again, Corpus Christi does not hold itself out to perform such service and there is no provision in its tariff for "heading" local cotton.

The record does not reveal when Respondents assume custody of export cotton shipments at the Port of Corpus Christi.

INITIAL DECISION

The Presiding Officer considered the crux of the controversy to be the ascertainment of how necessary cargo handling expenses are allocated between shipper and carrier once export cotton bales are delivered to each of the Texas ports involved. He found these expenses to be allocated differently at Houston, Galveston and Corpus Christi. At Houston, all costs are borne by the shipper. At Galveston the burden is sometimes on the shipper (rail cotton) and sometimes divided between shipper and carrier (truck and warehouse cotton). Shipper and carrier always divide handling expenses at Corpus Christi.[7] No evidence was found to support the Complainant's contention that cotton shipments are being diverted from Houston to the other ports because of Respondents' practices. In fact, the limited data submitted indicated that some 28,000 bales of cotton local to Corpus Christi was shipped from Houston during 1973–1974.

Despite the lack of economic injury to Houston, the Presiding Officer concluded that Respondents' partial payment of cotton "heading" expenses at Corpus Christi and Galveston, but not Houston, violates sections 16, 17 and 18 of the Act, and ordered Respondents to:

> Cease paying any of the costs of unloading, handling or heading cotton bales prior to the delivery of the cotton bales to the respondents unless they first publish tariff rules and regulations to that effect equally applicable to all shippers of cotton bales for export. I.D., at 12.

This result was grounded upon the premise that a carrier's payment of different cargo handling costs at different ports necessarily involves a discriminatory "absorption of costs otherwise chargeable to the shipper."[8] However, the only support offered for this sweeping proposition is two

[7] The Commission finds no evidentiary support for the Presiding Officer's uniquivocal determination on this point.

[8] The Presiding Officer held that:

> Undertaking a service or absorbing a charge which is otherwise chargeable to the shipper is a rebate and unless applicable to all shippers equally and set forth in the . . . tariffs of respondents is so clearly prohibited by the Shipping Act, 1916, as to be beyond dispute. I.D., at 11.

Commission decisions forbidding terminals from charging wharfage on non-railroad freight and making no such charge on freight tendered by railroads at the same port, *Practices of San Francisco Bay Area Terminals*, 2 U.S.M.C. 588 (1941), aff'd 320 U.S. 577 (1944); *Interchange of Freight at Boston Terminals*, 2 U.S.M.C. 671 (1942); and three decisions forbidding the furnishing of free storage to some shippers at a given port and not to others using the same port, *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525 (1966); *Storage Charges Under Agreements 6205 and 6215*, 2 U.S.M.C. 48 (1939); and *Storage of Import Property*, 1 U.S.M.C. 676 (1937).

Absent from the Initial Decision is any indication of whether the Respondents control the practices in question, that Respondents accept delivery or obtain custody of export cotton bales at the same time and in the same manner at each port; or that cotton "heading" expenses are costs which may properly be charged only to a shipper. Neither is there a finding that the differences in handling cotton at Galveston, Corpus Christi and Houston actually affect the shipper's cost in exporting cotton.

POSITION OF THE PARTIES

Both Galveston and Corpus Christi filed Exceptions to the Initial Decision. Replies to Exceptions were submited by Houston. The arguments of the respective parties are described below.

Galveston

Galveston excepts to the finding that "the facts at issue . . . are virtually without dispute," for it claims the Presiding Officer has misconstrued the evidence in a manner which led him to several inaccurate conclusions.

One significant factual error was the determination that delivery of cotton to carriers at Galveston and Corpus Christi was found to be "completed" at the time the steamship line's clerk tallied the cotton bales *and* gave a receipt for them. Galveston contends that the concept of "completed delivery" is crucial to the case and that it is "simply not true" that delivery is determined by the issuance of a cargo receipt; custody can and does pass from shipper to carrier regardless of whether the cargo has been receipted.

Galveston also excepts to the conclusion that 1) Respondents treat export cotton bales differently at Galveston and Corpus Christi than at Houston and 2) this difference in treatment violates sections 16, 17 and 18. Galveston claims the Presiding Officer's finding that "there is an economic burden on the bale of cotton to place it in the transit shed and that economic burden at Houston . . . is borne entirely by the shipper" (I.D., at 8) is inaccurate and contrary to certain testimony which indicated that once cotton is "unloaded" at Houston, any subsequent handling is

paid for by the carriers.[9] Galveston is convinced that this is precisely the situation that prevails at its port and at Corpus Christi—the shipper pays the "unloading" fee and the carrier pays for any subsequent handling or "heading." The carrier alone makes the decision to rearrange or position cotton which has been "unloaded" based upon the amount of cargo to be lifted and the amount of space available.

Galveston concedes that the three ports have different "unloading" charges and that their cotton handling practices differ to some extent, but argues that these differences are minor and without diversionary intent. Galveston further states that even if the differences were found to have some anti-competitive effect, they are based solely upon local labor practices and port conditions and are therefore justifiable under the Shipping Act. Only undue or unreasonable preferences are condemned by law, *Intercoastal Investigation*, 1 U.S.S.B.B. 400, 444 (1935), and the mere publication of different charges does not, *ipso facto*, imply unreasonableness.

Moreover, Galveston contends that since it was Houston and not the other ports which altered its historic practices, it rings strangely hollow for Houston to now claim that the very differences it voluntarily created constitute illegal discrimination.

Galveston's final argument is that Houston has the burden of proof in this proceeding and has utterly failed to demonstrate why the differences in handling cotton bales at the three ports are unjustly discriminatory or materially affect the cost of transporting cotton.

Corpus Christi

Corpus Christi's objections are similar to Galveston's. Essentially, Corpus Christi claims that the Initial Decision erroneously describes the point at which cotton is delivered to ocean carriers at its port. An alleged contradiction in the Initial Decision's findings is recited as evidence of the Presiding Officer's misunderstanding of the facts.[10] Several judicial decisions are then cited to support the proposition that goods are "delivered" to a carrier when they pass from the custody and possession of the shipper into the custody and possession of the carrier. These decisions hold that delivery is a factual question which does not totally depend upon the issuance or nonissuance of receipts or bills of lading as such documents are considered to be but partial evidence of when delivery occurs. Corpus Christi contends that the record clearly indicates that the Respondents have custody and possession of export cotton bales from the instant they are unloaded from trucks and dollies[11] on the transit

[9] The testimony was that of Mr. C.E. Bullock, General Manager—Operations, Port of Houston Authority.

[10] The inconsistency is that at page 7 delivery is deemed to be "completed at [the] time the bales have been tallied and the clerk has given a receipt," while at page 11 it is stated that the Respondents occasionally "accepted delivery at the point of unloading rather than in place."

[11] Corpus Christi points out that the alleged absorption of "heading" charges only occurs in the case of truck and local warehouse cotton; rail cotton is subjected only to an "unloading" charge at all three ports.

shed floor, and the "heading" charge is assessed only for work performed *after* "delivery" is completed.

The Initial Decision would, in the opinion of Corpus Christi, require Corpus Christi cotton shippers to assume the obligation and expense of handling the cotton bales after they have been delivered to, and are in the possession of, the carrier; it is the carrier, not the shipper, that desires to move or arrange the cotton once it is unloaded and it is the carrier that benefits from any such subsequent handling. Corpus Christi therefore concludes that it is perfectly proper for the carrier to bear the expense of "heading" the bales.

Houston

Houston's Reply to Exceptions supports the findings and conclusions of the Presiding Officer, and stresses the fact that Houston shippers pay all costs of unloading, handling and heading cotton bales into the ship's transit shed regardless of overland transportation methods, while at Corpus Christi and Galveston the cost of "heading" is borne by the vessel in some instance. The cargo delivery cases cited by Corpus Christi have no relevance to the instant proceeding, because, even though they necessarily turned upon the point where "complete delivery" was made, the issue before the court was the risk of loss, not the application of the Shipping Act. According to Houston, the facts show disparate cotton handling practices at the three ports and the mere existence of this disparity violates the Act.

Discussion and Conclusions

The record below is far from clear, but sufficiently describes cotton handling practices at Houston, Galveston and Corpus Christi to indicate that the complained of variations do not violate sections 16 and 17 of the Act. It has long been established that not all preferences or advantages offered by carriers are condemned by law, but only those that are undue or unreasonable violate the Shipping Act. *Delaware River Port Authority v. Transamerican Trailer Transport, Inc.* F.M.C. ,14 S.R.R. 1468 (1975), aff'd 527 F.2d 1386 (D.C. Cir. 1976); *Lake Charles Harbor and Terminal District v. Port of Beaumont Navigation District,* 12 F.M.C. 244 (1969); *Investigation of Overland and OCP Rates and Absorptions,* 12 F.M.C. 184 (1969), aff'd *Port of New York Authority v. Federal Maritime Commission,* 429 F.2d 663, 669–670 (5th Cir. 1970). *Stockton Port District v. Pacific Westbound Conference,* 9 F.M.C. 12 (1965), aff'd 369 F.2d 380 (9th Cir. 1966), *cert. den.,* 386 U.S. 1031 (1967); *Intercoastal Investigation,* 1 U.S.S.B.B. 400 (1935). Moreover, the existence of unjust discrimination or prejudice must be demonstrated by substantial proof. *Philadelphia Ocean Traffic Bureau v. Export S.S. Corporation,* 1

U.S.B.B. 538, 541 (1936); *Lake Charles Harbor and Terminal District v. Port of Beaumont Navigation District supra,* at 248.[12]

Applying these principles to the case before us, we find no basis for a determination that Respondents are selectively absorbing costs at Galveston and Corpus Christi which should be paid by their shippers or are otherwise unfairly discriminating against the Port of Houston. Houston's argument that the "heading" charges paid by Respondents are not true operational costs customarily associated with vessel loading and included in ocean freight rates without itemization is without support in the record. Nor does the evidence support the Presiding Officer's conclusion that the delivery of export cotton bales to the Respondents at Galveston and Corpus Christi is completed only *after* the challenged "heading" services are performed. Not only are the facts concerning the time at which cargo receipts are issued insufficient to support a precise finding on that point,[13] but existing case law unequivocally provides that the question of delivery is not decided entirely by the presence or absence of a cargo receipt. *E.g., Mackey v. United States,* 197 F.2d 241, 243 (2d Cir. 1952); *Stromeyer & Arpe v. American Lines S.S. Corp.,* 97 F.2d 360, 361 (2d Cir. 1938). We know of no Shipping Act authority which holds that completion of delivery is the sole criterion for allocating cargo handling expenses between shipper and carrier, and a flat policy which makes the validity of a given division of such expenses depend upon the moment a carrier chooses to issue a cargo receipt strikes us as arbitrary in the extreme.

We are not prepared to decide on the record before us whether any particular party must bear the heading fees on truck and local warehouse cotton unloaded at Galveston and Corpus Christi. We do, however, hold that Houston has failed to establish why its 1973 decision authorizing a uniform cotton "unloading" fee which includes positioning bales in the transit shed should necessitate a change in Galveston's and Corpus Christi's pre-existing cotton handling practices. The burden of proof in a section 22 complaint proceeding is always upon the complainant. When the burden is not met, the complaint must be denied.

Inasmuch as Houston has completely failed to demonstrate that the Respondents' payment of local "heading" charges has injured or unfairly affected any person, Houston's section 16 and section 17 allegations fail as a matter of law. The Shipping Act does not require all carriers or all ports to offer identical services or engage in the same practices. Competition and innovation are encouraged. Local differences are permit-

[12] In *Philadelphia Ocean Traffic Bureau, supra,* the Commission stated:

As a general rule there must be a definite showing that the difference in rates complained of is undue and unjust in that it actually operates to the real disadvantage of the complainants. In order to do this [a complainant must] reveal the specific effect of the rates on the flow of the traffic concerned and on the marketing of the commodities involved, and to disclose an existing and effective competitive relation between the prejudiced and preferred shipper, localities, or commodities.

[13] No information at all was provided concerning cotton receipting practices at Houston or rail cotton delivered at Galveston and Corpus Christi.

ted up to the point they unfairly injure shippers, ports or other persons protected by the Act.

Finally, Houston has not established whether shippers or carriers primarily benefit from any particular aspect of cotton handling at Galveston or Corpus Christi. No one other than the Respondents has been identified as having a duty to pay for "heading" and there is no indication that this practice materially affects the aggregate cost of shipping cotton at the various ports involved. Cotton handling practices at Galveston and Corpus Christi appear to be grounded upon local labor and geographical considerations of long standing and the gravamen of the instant section 18(b)(3) dispute lies not with the Respondent carriers' tariffs, but with those of the three Port Authorities—these tariffs do not specifically identify those instances when "unloading" charges paid by the shipper include "heading" at ship's berth and when they do not. While the Port Authority tariffs are beyond the scope of the present record, we strongly recommend that clarifying amendments be made to reflect the actual unloading and heading practices followed by each port.

All of these circumstances compel us to conclude that there is no basis for finding Respondents to have violated section 18(b)(3) of the Act by failing to file tariffs which state when the basic ocean freight rate will include "heading" charges.

Respondents' actions have not been shown to violate any section of the Shipping Act, 1916. Accordingly, the Initial Decision in this proceeding is reversed and the complaint of the Port of Houston Authority is denied. An appropriate order will be issued.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 73–73

PORT OF HOUSTON AUTHORITY

v.

LYKES BROS. STEAMSHIP CO., INC., ET AL.

ORDER

The above-captioned complaint having been duly heard and the Commission having this day made and entered a report stating its findings and conclusions thereon, which report is hereby expressly incorporated herein;

IT IS ORDERED, That the complaint of the Port of Houston Authority is DENIED.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

Subchapter B—Regulations Affecting Maritime Carriers and Related Activities

[DOCKET NO. 73-4; TARIFF CIRCULAR 3; GENERAL ORDER 13]

Part 531—Filing of Freight and Passenger Rates, Fares, and Charges in the Domestic Offshore Trade, Publication and Posting
Part 536—Filing of Tariffs by Common Carriers by Water in the Foreign Commerce of the United States and by Conferences of Such Carriers

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GRANT OF SPECIAL PERMISSION AND WAIVER OF TARIFF FILING REQUIREMENTS

June 29, 1976

This proceeding was originally instituted in February 6, 1973, to provide an exemption (pursuant to section 35 of the Shipping Act, 1916) from the Commission's tariff filing requirements to nonvessel operating common carriers by water (NVOCC's) engaged exclusively in providing transportation for used household goods and personal effects where there is also a domestic movement within the United States. In lieu of the tariff filing requirements of section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 844) and sections 18(a) and (b) of the Shipping Act, 1916 (46 U.S.C. 817, 817(b)), the proposed rule would have required the submission of a semiannual report covering, *inter alia*, the number of household goods shipments, the number of complaints concerning rates or service received and settled during the period, and the names of ocean carriers utilized.

Respondents[1] Who had originally sought the exemption subsequently moved for discontinuance of the proceeding on the grounds that the subject exemption was "unnecessary." After advising that the preponderance of the household goods shipments handled by them is Government Bill of Lading traffic for which they have thousands of world wide single-

[1] Household Goods Carriers' Bureau, Household Goods Forwarders Association of America, Inc., Bekins Van Lines Co., Bekins Moving and Storage Company of California, Bekins Moving and Storage Company of Hawaii, North American Van Lines, Inc., United Foreign Shipping Co., United Overseas, Inc., and United Van Lines, Inc.

factor rates on electronic key-punch cards, Respondents requested that they be allowed to work out with the Commission's staff:

> . . . a means of compliance which would not require a change from rate filings on electronic key-punch cards to manual filings, and which would also temper the burden upon the Commission, as well as Respondents, arising from the filing with the Commission of several hundreds of thousands of rates.

On July 7, 1975, the Commission issued its Order on Review of Discontinuance, wherein it determined that the proceeding "should remain open and be used as the vehicle whereby any alternative plan can be publicly presented to the Commission for approval."

After discussions between Respondents and members of the Commission's staff, the Household Goods Forwarders Association of America, Inc. (HGFAA) submitted a proposed tariff which does not fully comply with the tariff filing format of General Order 13 but which the Commission is asked to accept. The proposed tariff contains identical military basic tender rules, regulations, rates and charges, including the through government bill of lading computer printout rates, by carrier code, as are now filed with the Department of Defense (DOD) together with a specification of the port-to-port portion of the applicable through rates. In addition to requesting the Commission to waive the tariff format requirements of General Order 13, HGFAA also asks special permission, pursuant to section 18(b), to file supplements and/or revised pages on less than statutory notice, but not less than one day's notice.

On April 2, 1976, the Commission issued a Notice of Intent to approve the nonstandard tariff format of HGFAA and to grant a continuing authority under its special permission powers to relieve the HGFAA tariff from the statutory 30 days' notice requirement of section 18(b). However, before approving a waiver of the involved tariff filing requirements, the Commission solicited comments as to:

> Whether compliance with section 18(b)(2) is necessary in the above described circumstances to fulfill any valid regulatory purpose and whether waiver of the filing requirements will or will not substantially impair effective regulation by the Commission, be unjustly discriminatory, or be detrimental to commerce.

Only the Household Goods Carriers' Bureau (HHGCB) responded to the Commission's Notice. Essentially, HHGCB's position is that HGFAA's proposed method for complying with the Commission's tariff filing format is no more than a duplication of effort that will not justify the added financial burden incurred by the NVOCC's of household goods. In this regard, HHGCB points out that, except for that part of the proposed tariff which lists the port-to-port portion of the single factor rates between points in the U.S. and overseas countries, the remainder of the information therein is currently available to the public since it already is on file with the DOD.[2]

Moreover, HHGCB contends that HGFAA's proposed tariff is prema-

[2] HHGCB is of the opinion that, in any event, the port-to-port rate is meaningless to the general shipping public since the rate applies to shipments solely for the use of DOD.

ture since there exists pending legislation (S. 2023) which, in effect, would exempt NVOCC's of military household goods from the tariff filing requirements of section 18(b) of the Act. HHGCB therefore urges that the Commission "delay its action" in this proceeding until a final determination is made on the pending legislation. Additionally, HHGCB suggests that, if the bill should fail, there be a reopening of discussions between the Commission's staff and Respondents for the purpose of establishing a less costly and less redundant filing procedure applicable to all NVOCC's of household goods.

HHGCB's comments are generally unresponsive to the Commission's April 2 notice, and, to the extent they suggest delaying the action proposed in that notice, are unacceptable.

HHGCB's arguments of redundancy and excessive cost are not persuasive when it is considered that all the remaining NVOCC's are in favor of the Commission's proposed action. In fact, it was the NVOCC's, in the first instance, who suggested what the Commission now proposes. More important, section 18(b) of the Shipping Act, 1916, requires that carriers/conferences in foreign commerce file with the Commission rates and charges "for transportation to and from the United States ports and foreign ports between all points on its route and on *any through route which has been established*" (emphasis added). Thus, the requirement clearly applies not only to port-to-port traffic, but to through routes as well. Therefore, and until exempted, pursuant to section 35 of the Act, the law requires the filing of through rates with the Commission notwithstanding that such rates are also on file with another agency.

Further, HHGCB's suggestion that the Commission delay its action with respect to its waiver proposal until, at least, final action on the pending legislation must also be rejected. The Commission should not abrogate its responsibilities in anticipation of what Congress might do. If the legislation becomes law, it will be an easy matter to amend the Commission tariff filing regulations to conform to the Congressional action. In the interim, it is important that the Commission take some action in this area of cargo movement.

Finally, it is our opinion that the granting of our proposed waiver of the filing requirements will not substantially impair effective regulation by the Commission, be unjustly discriminatory or be detrimental to commerce.[3] In fact, we believe that a granting of a waiver under the circumstances presented here will reduce an unnecessary burden on both the Commission and NVOCC's. Not only is competition not a factor here since DOD is the only shipper of military household goods but also since DOD participates in the setting of the rates, it knows immediately when rates will become effective. The acceptance of a computer read-out should also enable the Commission to more effectively regulate the activities of these

[3] We would emphasize, however, that our action applies only to DOD shipments. Thus, NVOCC's who move nonmilitary household goods must still comply with the Commission's notice and format requirements of sections 2 and 18(a) and (b) of the 1933 and 1916 Acts respectively, and Tariff Circular No. 3 and General Order 13.

NVOCC's since it will now be given information that previously was considered too difficult to provide in the standard form required.

Accordingly,

IT IS ORDERED, That pursuant to section 4, Administrative Procedure Act (5 U.S.C. 553), section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 844) and sections 18(a) and (b), 22 and 43 of the Shipping Act, 1916 (46 U.S.C. 817,) 817(b), 821, 841(a), Parts 531 and 536 of Title 46, C.F.R. are hereby amended.*

Effective Date. The special permission and waiver herein granted shall become effective upon publication in the *Federal Register*.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

* The text of the amendment is reprinted in 46 C.F.R. 531.27 and 536.17.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75–12

CRESTLINE SUPPLY CORPORATION

v.

THE CONCORDIA LINE AND BOISE-GRIFFIN STEAMSHIP CO., INC.,

Carrier properly rated goods in question as synthetic sheets and tapes and applied proper tariff classifications.

Leon T. Knauer for Complainant.

Stanley O. Sher, Terrence D. Jones and *John R. Attanasio* for Respondent.

REPORT

July 1, 1976

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett, Bob Casey and James V. Day, *Commissioners*)

I. PROCEEDING

This proceeding was initiated upon the complaint of Crestline Supply Corp. (Crestline) against Concordia Line (Concordia) and Boise-Griffin Steamship Co., Inc. (Boise), alleging that Concordia overcharged Crestline for a shipment of synthetic rubber from New York, New York to Benghazi, Libya in violation of section 18(b)(3) of the Shipping Act, 1916 (Act).[1] Crestline seeks $15,868.40 in reparation—the amount of the alleged overcharge.

Administrative Law Judge William Beasley Harris (Presiding Officer) issued an Initial Decision denying the complaint. Crestline filed Exceptions and a Reply to Exceptions was filed by Concordia.

[1] Section 18(b)(3) provides in pertinent part, that:

No common carrier by water in foreign commerce . . . shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time. . .

II. BACKGROUND INFORMATION

Crestline is a Utah corporation engaged in the business of designing, supplying and installing water control and conservation structures through the world.

Concordia is a common carrier by water regularly engaged in the transportation of general cargo in the foreign commerce of the United States. It is also a member of the North Atlantic Mediterranean Freight Conference and its rates are governed by that organization's tariff. Boise acted as general agent for Concordia with respect to the disputed shipment, but is neither a common carrier by water nor an other person subject to the Shipping Act.[2]

The goods in question were butyl or synthetic rubber products purchased by Crestline from the Carlisle Tire and Rubber Company (Carlisle) for shipment to Libya where they would be further fabricated prior to being used in a water conservation project undertaken by the Government of Libya. The goods were shipped under Concordia's Bill of Lading No. 1065, dated September 27, 1975, which contained the following data:

No. of Packages	*Description of Packages and Goods*	*Gross Weight*	*Measurement*
102	Rolls: Butyl Rubber Sheets	134,640 lbs.	4700 CF
1	Pallet: Rubber Tapes	1,068 lbs.	79 CF
2	Pallets: Rubber Cement, 0 degrees	1,298 lbs.	103 CF

Prior to shipment, Crestline conversed with an ocean freight forwarder and with Carlisle concerning transportation charges and was under the impression that the freight rate would approximate $10,000. No rates were listed on the bill of lading issued to Crestline. Concordia subsequently rated the "Butyl Rubber Sheets" as *Rubber, Sheeting, N.O.S.* under Item 1454, North Atlantic Mediterranean Freight Conference Freight Tariff No. 10–FMC–3. The "Rubber Tapes" were rated as *Rubber, Goods, N.O.S.*, pursuant to Item 1450 of the same tariff. Both classifications were chosen on the theory that the goods were articles "manufactured from" synthetic rubber and not entitled to the rate for unfabricated synthetic rubber.[3] On this basis, Crestline was assessed freight charges in

[2] Boise did not reply to Crestline's allegations or participate in the instant proceeding in any manner.

[3] The North Atlantic Mediterranean Freight Conference Freight Tariff No. 10–FMC–3, effective August 15, 1974, contains only the following tariff classifications for rubber commodities.

Rubber, viz:
(1) Bands (1445a)
(2) Crude or Raw (1446)
(3) Foam, Slabs or Blanks (1448)
(4) Gloves (1449)
(5) Goods, N.O.S. (1450)
(6) Heels & Soles, Including Crepe (1451)
(7) Hose (1452)
(8) Reclaimed or Shoddy, in Compressed Sheets or Slabs [Not Scrap Rubber] (1453)
(9) Sheeting, N.O.S. (1454)
(10) Synthetic [Not Articles or Materials manufactured therefrom] (1455)
(11) Threads [camelback]

the sum of $24,244.24 which it duly paid.[4] Crestline was not aware of the commodity classifications employed by Concordia or the total freight due until after its goods were on the high seas.

The complaint asserts that Crestline was entitled to have its goods classified under Tariff Item No. 1455, *Rubber, Synthetic (Not Goods or Articles Manufactured Therefrom)*. Had this Item been applied, the parties stipulated that the charges would have been $9,278.87, or $15,868.40 less than Crestline actually paid.[5]

The Initial Decision held that the rubber sheets and tapes were articles "manufactured from" synthetic rubber or butyl, regardless of whether they required further processing upon arrival in Libya, and found no ambiguity in the term "manufactured" as it appeared in Tariff Item 1455. The Presiding Officer then concluded that Concordia properly applied Tariff Items 1454 and 1450, and that no violation of section 18(b)(3) had occurred. The following four reasons were expressly offered in support of this result: (1) Neither Respondent ever quoted Crestline a price of $9,000 to ship the goods in question;

(2) Crestline failed to establish that it had a contract with the Government of Libya to further process or install the rubber products in that country; the Libyans may have done the installation work themselves;

(3) No one supplied the Respondents with any cargo descriptions or directions different from those which appeared on Concordia's Bill of Lading;

(4) It is doubtful that transportation costs of $23,347.99 for commodities worth $205,988.00 into a troubled zone of the world are unjust and unreasonable or in violation of any section of the Act.

III. POSITIONS OF THE PARTIES

A. Complainant

Crestline excepts to the Presiding Officer's conclusion that Concordia correctly applied Tariff Items 1454 and 1450 to the butyl sheets and tapes in question and claims that the Initial Decision is procedurally and substantively defective in several areas.

Procedurally, the Presiding Officer is alleged to have:

1) Failed to articulate a rational basis for the conclusion he reached because the four "reasons" recited at pages 7 and 8 of the Initial Decision are irrelevant and immaterial to the cargo classification issue under review and because Crestline's arguments were not specifically rejected;

2) Improperly permitted Concordia's expert witness (McKenna) to testify that the

[4] Concordia applied its contract rate to Crestline's shipment.

[5] Crestline originally alleged that its rubber cement was also misrated and sought a total of $16,483.74 in reparations. The rubber cement claim was withdrawn at the prehearing conference and the demand for reparations reduced to $15,868.40. It should be noted, however, that the parties' stipulation concerning the Item 1455 rate applicable to the rubber sheets and tapes ($7,861.37—Hearing Exhibit 16) was improperly computed. The correctly computed *Rubber, Synthetic* rate would have been $14,473 and the amount of overpayment only $9,256.17. *I.e.*, 119.5 measurement tons multiplied by the $105.32 contract rate (including 19% bunker surcharge) plus 15% war risk surcharge.

rubber sheets and tapes were "fully manufactured for tariff purposes," while refusing to allow Crestline's expert witness (Kenney) to offer his opinion that Tariff Item 1455 was ambiguous in light of the nature of synthetic rubber.

Crestline concedes that its rubber sheets and tapes were to some degree "manufactured" out of synthetic rubber. It rests its claim to the Tariff Item 1455 rate on two contentions. First, the phrase "not articles manufactured therefrom" in Item 1455 is contradictory and ambiguous because all synthetic rubber is manufactured out of other chemicals. Secondly, Crestline's goods were not manufactured within the meaning of Tariff Item 1455, because they were not "completely finished," *i.e.*, further processing was required before they could be finally installed in the water conservation equipment for which they were ultimately intended. Consistent with this position, Crestline attributes the following substantive errors to the Initial Decision:

1) The uncontroverted testimony of expert witness Kenney was ignored and unwarranted weight was given to the testimony of expert witness McKenna;

2) The conclusion that the rubber sheets and tapes were sufficiently fabricated to be classified as "articles manufactured from" synthetic rubber is contrary to the weight of the evidence;

3) The conclusion that Tariff Item 1455 was unambiguous as applied to the disputed shipment is contrary to the weight of the evidence.

B. Respondent

Concordia supports the Initial Decision and claims the evidence shows that the butyl sheets and tapes shipped by Crestline were in an essentially different form than the large synthetic rubber bales from which they were fashioned by the Carlisle Company. Concordia further states that whereas synthetic rubber may be used to manufacture any product requiring synthetic rubber as an ingredient, synthetic rubber in the form of sheets and tapes has a relatively limited range of further uses; Crestline's claim that the sheets and tapes were not "finished products" must therefore be incorrect because the construction of watering facilities out of the sheets and tapes is a separate and distinct process from the manufacture of the sheets and tapes themselves.

Concordia also argues that the classification of products for ocean freight purposes does not depend upon the end use to which the consignee intends to put the product; if a roll of butyl sheeting is a finished product when pieces are cut off and placed directly on hospital beds, it should also be considered a finished product when pieces are joined together to form water proofing devices.

IV. DISCUSSION AND CONCLUSION

The uncontradicted testimony of Crestline's own witness,[6] is sufficient to dispose of this matter on the merits, and we also find that the rubber sheets and tapes shipped in 1974 were "manufactured" articles and that

[6] This witness was Hugh Kenney, Sales and Product Manager, Construction Materials Department, Carlisle Tire and Rubber Company. Mr. Kenney was qualified as an expert in synthetic rubber fabrication.

no Shipping Act violation has occurred. We cannot, however, simply adopt the Initial Decision without comment. Crestline's contention that the Presiding Officer's statement of reasons is critically unclear cannot be ignored. A more disciplined and logical approach is unquestionably required and rather than consume further time by remanding the proceeding for clarification, we have written our own decision denying Crestline's complaint.

The Carlisle Company fabricated the goods in question out of crumbly, bulk butyl which it purchased in 70 pound bales from one of several large synthetic rubber manufacturers such as DuPont or Exxon.[7] The butyl bales were then placed in mixing equipment with other materials such as pigments, extenders, vulcanizing agents and antiozonants, and the mixture run between two steel rollers to form synthetic rubber sheets approximately a quarter of an inch thick. After being scored for 48–72 hours, these sheets were fed into a calendar (a series of steel rollers) and further formed into much thinner sheets. The thin rolls of sheeting were then joined into the particular widths and lengths desired by Carlisle's customers, placed on a mandrel and vulcanized. After this processing, the rubber was no longer crumbly and the sheets could be directly employed in a variety of end products with only minor subsequent alterations. The only thing remaining to be done to Crestline's sheets and tapes upon arrival in Libya was to cut them to appropriate sizes and apply them to a tank or reservoir. They could also have been employed as inner tubing, heater ducts or roofing materials.

The primary factual question to be determined in this proceeding is whether the sheets and tapes were "manufactured from" synthetic rubber at the time they were shipped. Crestline's evidence aimed at proving that the sheets and tapes were not "completely finished" goods is irrelevant to this determination. The final application of a product with several possible end uses is immaterial to the proper classification of commodities for tariff purposes. *Misclassification and Misbilling of Glass Articles*, 6 F.M.B. 155, 159 (1960). The applicable freight rate should depend upon the intrinsic nature and market value of the goods themselves, rather than a shipper's representation as to the intended use of goods, as it would be virtually impossible for ocean carriers to ascertain whether each item transported is subsequently put to the use for which it was rated for ocean transportation.

The record leaves no doubt that Crestline's goods were sufficiently new and different articles from the butyl bales initially entering Carlisle's plant to be considered "manufactured articles." See generally, *Interstate Commerce Commission v. Weldon*, 90 F. Supp. 873 (W.D. Tenn. 1950), aff'd 188 F. 2d 367 (6th Cir. 1951), *cert. denied*, 342 U.S. 827 (1951), where shelled, but otherwise unprocessed peanuts, were held to be

[7] Butyl is itself "manufactured" out of petroleum products and other chemicals. In bales it represents an unprocessed stage of synthetic rubber comparable to that of natural rubber in its crude state.

"manufactured products" within the meaning of section 203(b)(6) of the Interstate Commerce Act.[8] *Cf. East Texas Motor Freight Lines v. Frozen Foods Express*, 351 U.S. 49 (1955); see also *Twine and Crude Rubber—Emery Transportation Company*, 311 I.C.C. 226 (1960); *A.N. Deringer, Inc. v. United States*, 40 Cust. Ct. 261 (1958); *United States v. International Paint Co.*, 35 C.C.PA. 87, 94 (1948).

The fact that all synthetic rubber is manufactured from petroleum products and other chemicals does not make Concordia's tariff ambiguous. Other than *Rubber, Synthetic* and *Rubber, Crude or Raw*, all rubber categories in the tariff describe specific products or groups of products. Tariff Item 1455 does not exclude "manufactured synthetic rubber." It excludes only "articles manufactured *from*" synthetic rubber. The former phrase would support the inconsistent and therefore ambiguous interpretation urged by Crestline. The latter language is plain on its face.

Applying the principles of tariff construction articulated in *Sacramento-Yolo Port Dist. v. Fred F. Noonan Co., Inc.*, 9 F.M.C. 551, 558–560 (1966), we find Tariff Item 1455 sufficiently clear as published to advise synthetic rubber experts and laymen alike that butyl bales (or other unprocessed, unvulcanized forms of synthetic rubber) are the only types of goods entitled to the *Rubber, Synthetic* rate.[9] The instant case is therefore readily distinguishable from *United States v. Hellenic Lines, Ltd.*, 14 F.M.C. 254 (1971) and *Rubber Development Corp. v. Booth S.S. Co., Ltd.*, 2 U.S.M.C. 746 (1945), where a tariff's intended meaning could not be fairly ascertained from its published language. We recognize that the term "manufactured" describes a process with no absolute boundaries and that different goods may be "manufactured" in varying degrees, so that carriers may upon occasion be required to make close judgments in rating synthetic rubber products for shipment. Such a situation does not make a tariff inherently ambiguous, and in this instance, the record shows that Concordia's assessment of Crestline's butyl sheets and tapes as "manufactured articles" was indisputably correct. *Cf. Trumbull-Vanderpool Co. v. Luckenback Co.*, 1 U.S.S.B. 126, 127–128 (1927).

Accordingly, on the basis of the foregoing and the entire record before us, it is concluded that the synthetic rubber sheets and tapes tendered for shipment on September 27, 1974, by Crestline Supply Corporation were

[8] 46 U.S.C. 303(b)(6).

[9] Crestline's hearsay evidence concerning the different rate quotations it received from three different freight forwarders between July and October, 1974, provides no basis for a finding of ambiguity. *Rubber Development Corp. v. Booth S.S. Co., Ltd., infra*, is inapposite, for there a carrier actually *applied* three different rates to successive shipments of the same type of metal basin, and the Commission found that the tariff was otherwise ambiguous. Extrinsic evidence is not considered when a tariff is unambiguous on its face. Moreover, a shipper's reliance upon a misquoted rate does not warrant the exaction of a rate different from that specified in the carrier's tariff. *Texas & Pacific Ry. v. Mugg*, 202 U.S. 242, 245 (1906); *Farley Terminal Co., Inc. v. Atchinson, Topeka & Santa Fe Ry. Co.*, 522 F.2d 1095, 1098 (9th Cir. 1975); *Ken Royce, Inc. v. Pacific Transport Line, Inc.*, 3 U.S.M.C. 183, 186 (1949); *Pacific Lumber & Shipping Co. v. Pacific-Atlantic S.S. Co.*, 1 U.S.M.C. 624, 625 (1936).

We also note that Crestline's "quotation evidence" is of little probative value in that it does not indicate that the three forwarders were given the same weights, measurements, and commodity descriptions with which to work or even that they consulted the same tariff. In fact, the rate quotation from Luigi Serra, Incorporated (Hearing Exhibit 6) states a rate for "synthetic rubber—butyl" without giving any indication that this butyl was in the form of rubber sheets and tapes.

not entitled to the rate described by North Atlantic Mediterranean Freight Conference Tariff Item 1455, and that Concordia Line properly classified these goods as *Rubber, Sheeting, N.O.S.*, and *Rubber, Goods, N.O.S.*, respectively. It therefore follows that Respondent Concordia Line did not charge or demand a greater or different compensation for the transportation of property than that specified in its duly filed Federal Maritime Commission tariff, and did not violate section 18(b)(3), Shipping Act, 1916, as to the aforesaid shipment. Crestline's Exceptions are therefore granted insofar as they demand a clarification of the Initial Decision and denied in all other respects. An appropriate order denying the complaint and terminating this proceeding will be issued.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75–12

CRESTLINE SUPPLY CORPORATION

v.

THE CONCORDIA LINE AND BOISE—GRIFFIN STEAMSHIP CO., INC.

ORDER

The Commission having fully considered the above matter and having this date made and entered of record a Report containing its findings, conclusions and decision therein, which Report is hereby referred to and made a part hereof;

IT IS ORDERED, That the complaint of Crestline Supply Corporation is denied, and that the proceeding in Docket No. 75–12 is dismissed.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 468

REAL FRESH, INC.

v.

MATSON NAVIGATION COMPANY

NOTICE OF ADOPTION OF INITIAL DECISION

July 28, 1976

No exceptions having been filed to the initial decision of the Administrative Law Judge in this proceeding, and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on July 28, 1976.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 468

REALFRESH, INC.

v.

MATSON NAVIGATION COMPANY

Adopted July 28, 1976

Requests to refund a portion and to waive collection of a portion of freight charges denied.

INITIAL DECISION ON REMAND OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

Matson Navigation Company (Matson) requested permission to refund a portion and to waive collection of a portion of the freight charges on three shipments of sterilized milk in hermetically sealed containers from Oakland, California, to Guam. Permission was requested to refund $170.77 and to waive collection of $327.38. Permission was granted in the initial decision. On review however, it was determined that section 18(b)(3) of the Shipping Act, 1916, did not apply as the foreign commerce of the United States was not involved. Rather it was the domestic offshore commerce of the United States and therefore the applicable laws would be section 18(a) of the Shipping Act, 1916, and Section 4 of the Intercoastal Shipping Act, 1933. The application was remanded for consideration under the foregoing sections of the Shipping Acts. In the Order of Remand it was stated:

> Unlike section 18(b)(3), section 18(a) of the 1916 Act and Section 4 of the 1933 Act do not contemplate refunds and waivers to compensate for errors in tariff filings. They do, however, empower the Commission to determine the reasonableness of a rate and to prescribe a reasonable maximum or minimum rate. Consequently while an error in a tariff may cause a particular rate to be unreasonable, it is not, standing alone and in the absence of a finding of unreasonableness, ground for permitting a carrier to charge rates other than those on file and in effect at the time of shipment.

In the present application Matson Navigation Company (Matson) requests authority to refund a portion of the charges and also requests

[1] This decision became the decision of the Commission July 12, 1976.

authority to waive collection of a portion of the charges applicable to three shipments of Milk, sterilized, in hermetically sealed containers aggregating 119,546 pounds or 2,768 cubic feet, carried per bills of lading dated September 9, 23, and 28, 1974, on Matson's vessels *Transchamplain, Transoneida,* and *Transontario,* from Oakland, California, to Guam. Matson issued on June 26, 1974, effective August 5, 1974, Second Revised Page 109, to its Guam Container Freight Tariff No. 32, FMC–F No. 152. In doing so, the rates for Items 1358 and 1359[2] were mistakenly changed to W/M from a W/T[3] basis. Accordingly, during the period of these three shipments, the $53.10 W/M rate was the applicable rate, resulting in a higher charge than would have been the case if the shipments had been rated on the basis of $53.10 W/T.

Consequently, on the shipment per bill of lading dated September 9, via the *Transchamplain,* $1,295.56 was paid, whereas it should have been $1,082.28. Permission to refund $170.77 is sought. On the shipment per bill of lading dated September 23, via the *Transoneida,* $1,093.11 was paid, whereas it should have been $1,268.07. Permission to waive collection of $174.96 is sought. On the shipment per bill of lading dated September 28, via the *Transontario,* $1,418.13 was paid, whereas it should have been $1,570.55. Permission to waive collection of $152.42 is sought.

According to the application the increased charge resulted from the fact that the charges were based on a measurement rather than on a weight basis. Nothing more is offered. All the precedents cited by Matson involved the foreign commerce and not the domestic offshore commerce of the United States. By way of example, but not limitation, determination of the reasonableness of rates involves comparison of rates; (*Oxenberg, infra*); cost of service; distance; taxes; nature of the commodity; volume of movement; and return on investment.

Unlike *Oxenberg Bros., Inc. v. United States,* 3 F.M.B. 583 (1951), where the rate charged varied so greatly from rates for the same commodity between nearly equidistant points on the same route as to be clearly unreasonable and therefore in violation of section 18 of the Shipping Act, the situation in the instant situation is more like that presented in *Davies, Turner & Co., as Agents for Robert S. Schlesinger, Owner v. Atlantic Lines, Ltd.,* 13 F.M.C. 279 (1970). There the final charges for the transportation were merely alleged to have been higher than the charges originally quoted the shipper because the carrier's agent had not been advised that the rate he quoted had been deleted from the tariff over a month before. The Commission concluded:

> The application in this instance, like that in East Asiatic,[4] . . . does not even allege

[2] Item No. 1358, MILK STABILIZER, powdered W/M $87.03. Item No. 1359, MILK STERILIZED, in hermetically sealed containers with or without added flavoring, W/M $53.10.

[3] Rate applies per ton of 2,000 pounds.

[4] *The East Asiatic Co., Inc.—Application for Permission to Waive Collection of Undercharges,* 9 F.M.C. 169 (1965).

that the rate duly applied was unreasonable nor does the record contain facts upon which such a finding can be made. There being no alternative, the application is hereby denied. (Footnote added.)

Moreover in *East Asiatic, supra,* it was concluded:

The Examiner, however, did not find nor did the applicant allege that the duly applicable rate was unreasonable and that the rate actually charged was reasonable. Indeed, the record is devoid of any facts upon which we, in the final analysis, could make any such findings. Therefore, on the basis of the record before us, we have no alternative but to deny East Asiatic Inc.'s application.

As the determination of a reasonable (lawful) rate is a prerequisite to establishing damages which is the difference between reasonable and unreasonable rates,[5] and as such determination cannot be made here, the request of Matson Navigation Company to refund a portion and to waive collection of a portion of the freight charges on the aforementioned shipments must be denied.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
June 30, 1976.

[5] *Mueller v. Peralta Shipping Corp.*, 8 F.M.C. 361 (1965).

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 332(I)

F. POWERS CO., INC.

v.

ORIENT OVERSEAS CONTAINER LINES

Claimant's contention that its cargo was destined for the Port of San Francisco and not the Port of Oakland is sufficiently supported by the evidence.

Respondent's policy of not paying overland transportation charges from the port of discharge to the bill of lading port on LTL shipments is disallowed because:

(1) Respondent's Tariff Rule 28 expressly provides for cargo forwarding to the bill of lading port at carrier expense without distinguishing between LTL and trailer load shipments.

(2) The implementation of special rules for LTL shipments which are not stated in a carrier's tariff violates section 18(b)(3) of the Shipping Act, 1916.

Daniel L. Goldberg for Claimant.

REPORT

August 18, 1976

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett, Bob Casey and James V. Day, *Commissioners*)

This proceeding was initiated upon the informal complaint of F. Powers Co., Inc. (Claimant), a textile importer principally located in San Francisco, against Orient Overseas Container Lines (Respondent), a common carrier in the foreign commerce of the United States subject to our jurisdiction. Claimant alleges that Respondent failed to adhere to Rule 28 of its FMC tariff in violation of section 18(b) of the Shipping Act, 1916 (46 U.S.C. 817(b)).[1]

[1] Hong Kong Eastbound Pacific Coast Tariff No. 1 (FMC–1). Prior to October 1974, Tariff Rule 28 provided:

If the carrier discharges cargo at a discharge port other than the port of discharge named in the bill of lading, the carrier *may* arrange at its *option* to move the shipment from actual port of discharge as follows:

To the port of destination stated in the bill of lading, alternatively the carrier may forward the cargo direct to a point

The instant controversy concerns eight relatively small shipments of cotton goods from Hong Kong to San Francisco, California, transported during the period of October 1973 to September 1974. Claimant states that San Francisco was the intended port of discharge. The goods were unloaded at Oakland and trucked to San Francisco in less than trailer load (LTL) lots at a total cost of $297.93, which was paid by Claimant.

It is alleged that Respondent has followed a "policy" of not paying the transportation costs involved in trucking less than trailer load goods from the port of discharge to the bill of lading port of destination while paying the trucking fee on full trailer load shipments. Respondent does not deny it has followed such a policy, and the issue to be resolved is whether a distinction between LTL and full trailer load shipments is permitted under Respondent's FMC tariff, and if not, whether Claimant is entitled to reparation for the $297.93 it paid for overland transportation on the eight shipments in question.

The matter was referred to Settlement Officer James S. Oneto, who issued a decision on June 29, 1976, denying the complaint on two separate grounds:

(1) The Claimant did not produce the bills of lading but only invoices, and the bill of lading ports cannot, therefore, "be established with sufficient certainty to make a determination thereof."

(2) The shipments involved were LTL shipments, the carrier had a policy of not paying equalization on LTL shipments, and because no such allowance was contained in the tariff, reparation cannot be granted.

As to the first ground for denial, the Claimant alleged that although the port of discharge was Oakland, the bill of lading specified San Francisco. As evidence of that allegation the Claimant submitted carrier invoices. All but one of these show a space calling for the bill of lading number, and in all those invoices there appears in that space before the number the notation "HK-SF." The Claimant states that this signifies Hong Kong as the port of loading and San Francisco as the port of destination as specified in the bills of lading.[2]

The invoices attached to the complaint indicate Oakland as the port of

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designated by the consignee, provided, the consignee pays the costs which the consignee normally would have incurred to move the cargo to such point had the cargo been discharged at the port of destination stated on the bill of lading. (Emphasis added.)

In *Konwal Co., Inc. v. Orient Overseas Container Line*, 16 S.R.R. 395, 482 (1975), the Commission held that this version of Rule 28 obligated the carrier to pay the cost of overland transportation from Oakland (the actual port of discharge) to San Francisco (the port of discharge specified on the bill of lading) and awarded reparation for eight LTL shipments where the carrier had not paid.

The rule was subsequently amended, effective October 1, 1974, and now reads:

If the carrier discharges cargo at a discharge port other than the port of discharge named in the bill of lading, the carrier (C) *shall* arrange at its (C) *expense* to move the shipment from actual port of discharge as follows: To the port of destination stated in the bill of lading, alternatively the carrier may forward the cargo direct to a point designated by the consignee, provided, the consignee pays the costs which the consignee normally would have incurred to move the cargo to such point had the cargo been discharged at the port of destination stated on the bill of lading. (Emphasis added).

[2] It is a common steamship practice to identify bills of lading by port of loading and port of discharge, with a numerical number following, thus B/L Hong Kong/San Francisco 1, or B/L Hong Kong/Los Angeles 12, etc.

discharge. In referring to the bill of lading, however, the invoices contain the annotation: "B/L HK-SF." This supports Claimant's contention that while Oakland was the port of *discharge*, the port of *destination* was San Francisco.

The Respondent's reply to the complaint significantly does not deny that the bill of lading port was in fact San Francisco. The Respondent says only that:

> We note with interest that [the Complainant] filed this complaint . . . apparently on the strength of "HK-SF" bill of lading numbers taken from truck invoices and . . . without . . . copies of the actual bills of lading. . . .

The Respondent could have denied that San Francisco was the bill of lading port or could, itself, have provided copies of applicable bills of lading if San Francisco was not shown thereon as the bill of lading destination. Instead the Respondent merely noted the Claimant's form of proof.

Rule 5(d) of the Commission's Rules of Practice and Procedure [46 C.F.R. 502.63] provides:

> Recitals of material and relevant facts in a complaint . . . unless specifically denied in the answer thereto, shall be deemed admitted as true. . . .

The Respondent's allusion to Claimant's allegation is not such a denial. Consequently it must be taken as established that San Francisco was the bill of lading port of destination.

Furthermore, if the Settlement Officer deemed the proof inadequate, which we do not, he should have required the Claimant or the Respondent to supply additional documentation [46 C.F.R. 502.304(a), (e)]. The Claimant states that he was unable to obtain copies of the bills of lading, and the Settlement Officer should have directed the Respondent carrier to produce them.

The second ground for the Settlement Officer's decision rests on the Respondent's policy on LTL shipments of not assuming to pay equalization from the port of discharge to the bill of lading port. The Respondent, in fact, places its main reliance on that policy, and says that all importers were aware of it (including the Claimant) and that the Claimant is therefore barred from seeking reparation for equalization of LTL shipments to the bill of lading port of destination. This asserted "policy" or rule did not appear, at the pertinent time, in Respondent's filed tariff.

The Settlement Officer concluded that because:

> . . . respondent's rule that no equalization would be paid on LTL shipments . . . was not embodied in respondent's tariff . . . therefore reparation . . . could not be awarded thereon.

If that were the law we could not award reparation unless a carrier's tariff specifically provided for the payment of reparation in the event a shipper were overcharged.

The fact is that the Respondent's Tariff Rule 28 provided for the forwarding of cargo, at carrier's expense, from the port of discharge to

the bill of lading port without distinguishing between LTL and trailer load shipments. Similarly, no other provision of the Respondent's tariff added such a qualification.

Section 18(b)(1) of the Shipping Act, 1916, provides that tariffs shall contain "any rules or regulations which in anywise change, affect, or determine" the tariff rates. Consequently, the Respondent carrier could not by a statement of policy, no matter how widely published, establish a rule binding on shippers unless such rule was first filed with the Commission under section 18(b). An unfiled rule distinguishing between LTL and trailer load shipments not only cannot be relied upon to deny reparation, but itself violates section 18(b)(3) of the Act by denying transportation privileges to LTL shippers in a manner not stated in Respondent's Tariff.

The Respondent states in its answer to the complaint that it changed its policy in October 1974 and began paying equalization on the Claimant's shipments. Thus, at that time, Respondent began to fully adhere to its tariff rule without asserting any other disqualification in Claimant's shipments. Therefore, there being no other defects in the Claimant's shipments at issue here, the Claimant is entitled to reparation as set forth in its complaint.

An appropriate Order will be issued.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 332(I)

F. POWERS CO., INC.

v.

ORIENT OVERSEAS CONTAINER LINES

ORDER

The Commission having fully considered the above-styled matter and having this date made and entered of record a Report containing its findings, conclusions and decisions therein, which Report is hereby referred to and made a part thereof;

IT IS ORDERED, That the Settlement Officer's Decision js reversed and reparation in the amount of $297.93 is awarded.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75–37

INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION
INTERNATIONAL FREIGHT SERVICES, LTD.

ADOPTION OF INITIAL DECISION

August 18, 1976

This proceeding was instituted to determine whether, in view of the past activities of Mr. Ismail K. Renno and Mr. Rafael Swift, two of the Applicant's principal officers and stockholders, International Freight Services, Ltd. (IFS) is fit and able to properly carry on the business of forwarding and to conform to the provisions of section 44 of the Shipping Act, 1916, within the meaning of that statute, and whether its forwarder application should be granted.

In his Initial Decision, Administrative Law Judge John E. Cograve concluded that the Applicant lacked both the fitness and ability necessary to be licensed and accordingly denied IFS's application. The basis of his conclusion were (1) the false representations made in IFS's application and to the District Investigator and (2) IFS's lack of experience to conduct an ocean freight forwarding business.

No exceptions were filed to the Initial Decision. However, IFS and Hearing Counsel have submitted a stipulation intended to clarify the record with respect to the "fitness" of Mr. Dennis M. Costin, a third IFS officer, to carry on the business of ocean freight forwarding. In the course of his opinion, the Presiding Officer found that Costin was not a stockholder of IFS as was represented in the application. The joint stipulation, citing section 1701.01(F) of Ohio General Corporation Law, advises that, by virtue of a subscription agreement, Costin is in fact an IFS shareholder under Ohio Law. This proceeding is now before us on our own motion to review.

While we are accepting the joint stipulation, it does not in any way undermine Judge Cograve's ultimate determination in this proceeding. The legal status of Costin as a stockholder or nonstockholder is wholly irrelevant to the matter at issue in this proceeding. What is important is that on the record neither Renno, Swift, nor, for that matter, Costin, have the necessary ocean forwarding experience to qualify IFS for an ocean freight forwarder license.

Even assuming, *arguendo*, that IFS had an officer qualified to conduct ocean freight forwarding, there is still the matter of Swift submitting false information to the Commission and its representative with the presumed knowledge of Renno (who together hold most of the IFS stock). This activity alone calls into question Applicant's "fitness" to conduct a freight forwarder operation.

Therefore, we are of the opinion that the Presiding Officer's findings and conclusions were proper and well founded. Accordingly, we are adopting the Initial Decision (a copy of which is attached) as our own and making it a part hereof.

By the Commission.

(S) JOSEPH C. POLKING,
Assistant Secretary.

FEDERAL MARITIME COMMISSION

No. 75–37

INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION
INTERNATIONAL FREIGHT SERVICES, LTD.

Adopted August 18, 1976

Applicant found neither fit nor able to conduct the business of forwarding within the meaning of the Shipping Act, 1916.
The application is denied.

W.B. Ewers for applicant.

Paul J. Kaller and *Bert I. Weinstein* as Hearing Counsel.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

The Commission instituted this proceeding to determine whether International Freight Services, Ltd. (International), should be licensed as an independent ocean freight forwarder under section 44 of the Shipping Act, 1916 (46 U.S.C. 841b). The present application is the third one to be filed by International.

In November of 1973 International filed its first application for a freight forwarder license, but it was withdrawn and a revised application was filed in March of 1974. After review of the second application the Commission advised International of its intent to deny the requested license. International made a timely request for a hearing to contest the Commission's intended denial and by Order served in December of 1974, Docket 74–54 was instituted.[2]

In February of 1975, prior to hearing in Docket 74–54, International filed its third application—the one under scrutiny here. With the filing of the third application, Docket 74–54 was dismissed and after due investigation of the third application, notice to International of intent to deny that application, and timely request by International for hearing, the present proceeding was instituted. The Order instituting this proceeding raises issues concerning the fitness and ability of the applicant to carry on the business of forwarding. At issue are certain fraudulent representations alleged to have been made by the applicant to the Commission which if

[1] This decision will become the decision of the Commission August 18, 1976.
[2] The provisions 46 CFR § 5108(a) set forth the procedure governing the issuance and denial of licenses.

proven would raise questions as to applicant's fitness to be a forwarder, and an asserted lack of experience which if true would question applicant's ability to carry on the business of forwarding. The Commission's Order details certain apparent conduct which came to light during its investigation of International's first and present applications.

The Commission's Order instituting this proceeding states that the investigation of International's first application revealed (1) an apparently false enlargement of the experience of one of International's employees who was to be the qualifying officer of the corporation pursuant to section 510.5(a)(2)(iii); (2) that Mr. Rafael Swift, the President of International apparently induced an employee and another person to make false representations to a Commission investigator; and (3) that Mr. Swift stated that he was a citizen of the United States when apparently he was a citizen of Mexico.

The Commission's Order then goes on to state that on the present or third application a Mr. Ismail K. Renno appears as President and majority stockholder of International; that Mr. Rafael Swift, previously listed as President and sole stockholder of International, now appears as Executive Vice President and a minority stockholder of International, and that a Mr. Dennis M. Costin is also named as an Executive Vice President and minority stockholder of International.

According to the Commission's Order, investigation of the third application (the one here in question) revealed apparently:

(1) that Mr. Renno was always, in fact, the majority stockholder of International;

(2) that while Mr. Swift had previously stated that the capitalization of International came exclusively from his own personal savings and proceeds from loans he had received from a bank, Mr. Renno also contributed substantial monies for the capitalization of International;

(3) that Mr. Swift had stated on an application for an International Air Transport Association cargo agency that he was the sole stockholder of International, when he was not;

(4) that Mr. Swift's conduct while with a previous employer gave rise to a lawsuit in which a final judgment of $1,000.00 was entered and an injunction was issued prohibiting Mr. Swift from soliciting employees and accounts from the employer;

(5) that Mr. Renno appears to have been a party to the deceptions and falsehoods of Mr. Swift, as they relate to the ownership of International.

The Order then raises the issue of the lack of experience on the part of both Renno and Swift.

For the purpose of this decision it is presumed that except for the issues raised in the Commission's Order the application of International is in all other respects proper. This presumption makes necessary some comment on the procedure adopted for the trial of this case. At the prehearing conference, Hearing Counsel took the position that it was incumbent upon the applicant to proceed first and present a case demonstrating that International was "fit, willing and able" to conduct the business of forwarding. The reasons given for this position were that (1) the Order instituting this proceeding made International a "petitioner"

pursuant to Rule 3(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.41) and (2) section 22 of the Shipping Act, 1916, which had appeared in previous orders in forwarder licensing cases as authority for their institution, had been omitted from the Order in this proceeding.

It was my view however that (1) the Commission's Order contained certain allegations of fact which if proven would appear to demonstrate that applicant was not qualified for a license; (2) the evidence to support the allegations which was developed during the investigation of the applicant was then in the hands of Hearing Counsel; and (3) had the Commission's investigation uncovered anything else tending to disqualify applicant it would have included appropriate allegations in its Order. Thus, absent proof of the specific allegations in the Order, International was qualified for a license. Under these circumstances to have the applicant to proceed first and prove that he was "fit, willing and able" to conduct the business of forwarding would make the applicant spread on this record facts which were not challenged by the Commission's staff during its investigation nor raised as issues in the Commission's Order; or if applicant chose to challenge the allegations in the Commission's Order, he would be put in the position of disproving allegations in support of which no evidence had yet been adduced—he would be attempting to prove the negative. Accordingly, I ruled that Hearing Counsel must proceed first and present his case in support of the allegations in the Order.

Hearing Counsel take no issue on brief with the procedure adopted and I only allude to it here because of the impression conveyed to me by Hearing Counsel that the Commission had intended a new type of procedure when it made the mentioned changes in its Order. I have no idea what if any changes in trial procedure were intended by the Commission when the Order was changed, and they are not evident from the terms of the Order. If faced with the same kind of order in the future, I would adopt the same procedure.

The statement of facts set forth below is divided into two parts. First, those findings dealing with the alleged misrepresentations of applicant to the Commission, and second, those findings concerned with the experience or lack of it on the part of the applicant corporation's qualifying officer. Certain other facts appear in the Discussion and Conclusion portion of this decision primarily due to an effort to achieve continuity in presentation.

Misrepresentations

On its first application, International represented one Miss Belinda Hilbert as an officer of International and gave her experience as two years in "international freight forwarding." On January 24, 1974, Mr. Swift, then the purported President of International, informed the Commission's District Investigator Robert St. John that Miss Hilbert was

to be the officer of International who had sufficient ocean freight forwarding experience to qualify International for a license.

On January 25, 1974, Mr. St. John phoned Miss Hilbert and she then said that she had approximately three years of ocean freight forwarding experience. Later, on February 6, 1974, Miss Hilbert visited the Commission's New York District Office and talked with Mr. St. John. At that time she apologized to Mr. St. John for giving him false information during their earlier phone conversation. She then admitted that she had only five months ocean forwarding experience. Miss Hilbert explained that Mr. Swift was "listening in" on her conversation with Mr. St. John and that Mr. Swift was directing her responses to Mr. St. John's questions by means of written notes.

Again on January 24, 1974, Mr. Swift told Mr. St. John that he had confidentially arranged to hire a Miss Margaret Sforzo, then employed by Paulsen & Guice, a licensed freight forwarder, and that in the event International was granted a license, Miss Sforzo would become a vice-president of International.[3] Subsequently, Mr. St. John phoned Miss Sforzo and she confirmed that she had made an arrangement with Mr. Swift whereby she would work for International as a vice president. Later, however, Mr. St. John interviewed Miss Sforzo at Paulsen & Guice—this was on February 8, 1974. During the interview Miss Sforzo apologized to Mr. St. John for her previous statements. She then told Mr. St. John that her previous statements had been made at Mr. Swift's instigation, that he had suggested that she tell Mr. St. John that she was to be a vice president of International when in fact the true situation was that she was to be a vice president in "name only with a salary of one dollar."

Rafael Swift signed International's first application as President thereof and reported his citizenship as "United States" with date and place of birth as "11/19/49, Galveston, Texas." On the second application, Swift, again as President, reported his citizenship as "Mexican" with date and place of birth as "11/19/49, Matamoros, Mexico." Swift further gave his residence as Cleveland, Ohio, from 1949 to the present. Finally on the third application Swift gave his citizenship as "United States" with date and place of birth as "11/19/49, Matamoros, Mexico." As for Swift's residence being Cleveland, Ohio, from 1949 to present, the record shows that he moved from Mexico to Galveston in 1951, remained in Galveston until 1957, when he moved to Cleveland, Ohio.[4]

International's first application, filed November 30, 1973, shows Rafael Swift as the President and sole stockholder of the outstanding shares of International. But by an agreement executed November 3, 1973, four of

[3] On at least one occasion Ismail Renno also discussed with Miss Sforzo her possible "employment" with International.

[4] Again, applicant doesn't challenge the accuracy of the facts surrounding Swift's representations concerning birthplace, citizenship and residence. He only points to Swift's assertions that he "thought" he was a citizen of the United States, and urges that there is no fraud involved because there was no misrepresentation of a "material fact," i.e., United States citizenship is not a requirement for a forwarder's license.

the six shares of International's stock were held in "trust" by Swift for Ismail Renno. The shares were deliverable to Renno on demand.

On December 3, 1973, Rafael Swift in the course of sworn testimony offered in open court in the course of a lawsuit against him by a former employer, stated that he was not an officer or director of International, but that he held stocks for "some people" and was the statutory agent for the corporation. Yet on the second of International's applications filed with the Commission on March 18, 1974, Swift again described himself as the President and sole stockholder of International.

Swift and Renno, on October 15, 1973, executed a "Management Agreement." Swift was to receive $17,000 a year as "Manager" and Renno was to receive $12,000 a year as "Partner." The agreement further provided that Swift and Renno would make "all major decisions . . . jointly." By a further "Agreement" made November 6, 1973, the subject of which was "Stock Issue" Swift, after "being first duly sworn" deposed that "four (4) shares of six (6) shares of common stock of the aforesaid International . . . that are held are being held in trust for the benefit of Ismail Renno." The agreement further provides "that upon demand of the said Ismail Renno, I [Swift] will immediately assign and release to the said Ismail Renno and/or his nominee, four (4) shares of common stock of International. . . ." Although denominated as "Agreement" the document of November 6, 1973, is nothing more than a sworn affidavit by Swift. As already noted in the first application filed with the Commission on November 30, 1973, Swift listed himself as President and sole owner of International.

The third application filed by International shows the ownership of the corporation as: Ismail Renno—51 percent, Rafael Swift—30 percent, Dennis Costin—10 percent. Mr. Costin has not contributed financially to the corporation nor has he been issued any shares of stock.

Mr. Renno in his testimony stated that both Rafael Swift and himself obtained $5,000 loans individually and a $15,000 loan jointly "to start the company."

Over a period of time International issued salary checks payable to one J. Knott. Swift testified that the monies were paid to J. Knott for consultation services. J. Knott is actually the maiden name of Mrs. Renno and at no time did she perform any services for International.

In May of 1974 International applied for an International Air Transport Association cargo agency. On the application Swift represented that Rafael Swift was the sole shareholder of the corporation and that no other individuals or business entities had any financial interest or any other form of control in the corporation.[5] Subsequently in May of 1975 a revised application reflecting Renno's stock ownership was filed. Ultimately the application was approved.

Between February of 1969 and November 13, 1973, Swift was

[5] Ismail Renno reviewed the application prior to filing it with IATA.

employed by All-Airtransport, an air export and import company whose place of business was in Cleveland, Ohio. While still an employee of All-Airtransport, and prior to submitting a letter of resignation or other notice of such action, Swift phoned a Mr. Dodsworth requesting him to divert traffic from American Sterilizer Company to International. Swift called a Mr. Gusky of the Broadhead Garrett Company requesting him to alter a bill of lading so as to consign a shipment to International. Swift also caused an employee of the McGee Company to divert a shipment to International. These actions were made possible by Swift's access to All-Airtransport's customer files which were under his control. These actions of Swift gave rise to a lawsuit by All-Transport against Swift. In its final order the Court of Common Pleas, Cuyahoga County, Ohio, enjoined Swift from using confidential information obtained while an employee of All-Transport and from soliciting employees of All-Airtransport, and from announcing his former employment with All-Airtransport. International also paid $1,000 in settlement of the controversy.

Lack of Experience

Neither Swift nor Dennis Costin has ever performed ocean freight forwarding services which are defined by the Commission as encompassing "freight forwarding service or dispatching of shipments" at 46 CFR § 510.2(c).

Renno has personally handled only a single ocean shipment. This occurred in London while Renno was directing the operations of Cleveland Freight Service a wholly-owned subsidiary of International. However, both Swift and Renno point to their experience in air forwarding and urge what is in effect the transferability of that experience to ocean forwarding. This question of transferability together with further facts found on the alleged lack of experience of applicant is deferred to a later portion of this decision.

Discussion and Conclusions

Under section 44 of the Shipping Act, 1916, anyone who desires to engage in the business of ocean freight forwarding must first secure a license from the Commission. Before issuing a forwarding license, the Commission must determine that an applicant is "fit, willing, and able to carry on the business of forwarding." (Section 44, Shipping Act, 1916, 46 U.S.C. 841b.) Hearing Counsel urge that International's application for a forwarder's license be denied because of its "lack of fitness and ability to carry on the business of forwarding." Applicant, of course, asserts the contrary.

A license granted under section 44 is somewhat more than a mere license to do business. The holder of a forwarder's license "occupies a position of enormous competitive and economic power and enjoys a fiduciary relationship with shippers." *Dixie Forwarding Co., Inc., Appli-*

cation for License, 8 F.M.C. 109 (1964). In the *Dixie* case, *supra*, the Commission spoke of the standards required of licensees under section 44:

> The business integrity of one who occupies the position of freight forwarder should be above reproach and he should clearly demonstrate a complete awareness of and a willingness to accept the responsibilities that the preferred position imposes . . . [T]he philosophy of section 44 is such that the shipping public should be entitled to rely upon the responsibility and integrity as well as the technical ability of a freight forwarder. (8 F.M.C. at 118.)[6]

The giving of false information to the Commission or its representative is to be considered in determining the fitness of an applicant. *Dixie, supra; Independent Ocean Freight Forwarder License Application—L.T.C. Air Cargo, Inc.*, 13 F.M.C. 269 (1970); and *Harry Kaufman-Independent Ocean Freight Forwarder License*, 16 F.M.C. 256 (1973).[7]

The record in this proceeding is replete with instances of applicant's cavalier approach to the truth of representations made by it to the Commission and its representative, Mr. St. John. To demonstrate applicant's approach to the disclosure of discrepancies in its various representations in at least two instances a chronology is instructive.

International's first application was filed with the Commission on November 30, 1973. That application listed a Miss Belinda Hilbert as an officer of International. On January 24, 1974, Swift informed District Investigator St. John that Miss Hilbert was to be the officer of International who had sufficient ocean freight forwarding experience to qualify International for a license. During this same conversation Swift also informed the District Investigator that he had "confidentially arranged to hire a Miss Margaret Sforzo, then employed by a forwarder, to become a vice president of International in the event International was granted a license."[8]

On January 25, 1974, one day after Swift's conversation with Mr. St. John the latter phoned Miss Hilbert who then stated that she had approximately three years ocean forwarding experience. At about this same time Miss Sforzo in another phone conversation with Mr. St. John confirmed that she was to be a vice president of International.

On February 6, 1974, some two weeks after her phone conversation with Mr. St. John, Miss Hilbert visited the Commission's New York

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[6] Applicant does not question the applicability of the "standards" quoted above, rather he argues against the comparison of the conduct of the applicant in the *Dixie* case with his own. This, of course, misses the point. No such comparison is made or even suggested. Interestingly, upon reconsideration Dixie was granted a license because (1) applicants emphasized that their livelihood depended upon their being licensed; and (2) applicants have committed themselves to "cooperate fully with the Commission and adhere scrupulously to the requirements of the law and the requirements imposed by the Commission." *Dixie Forwarding Co., et al. Application for Licenses*, Report on Reconsideration, 8 F.M.C. 167 (1964). Subsequently the licenses were "voluntarily" submitted for cancellation in the face of further proceedings to revoke them. (See Commission Order dated October 19, 1966, dismissing the proceedings in Docket No. 66-44.)

[7] Section 510.9(c) of General Order 4 (46 CFR 509.9(c)) provides that a license may be revoked, suspended or modified for "making any wilfully false statements to the Commission in connection with an application for a license or its continuance in effect."

[8] About the only conclusion one can come to concerning the confidentiality of the hiring of Miss Sforzo was that it was not known to Miss Sforzo's then employer Paulsen & Guice. Certainly everyone else concerned, Swift, Renno and Miss Sforzo, knew about it.

District Office and apologized to Mr. St. John for giving him "false" information during her previous phone conversation with him. Miss Hilbert explained that Swift was listening in on another extension and was telling her what answers to give to Mr. St. John by passing her notes written on pages from a yellow legal pad.

On February 8, 1974, two days after Miss Hilbert's visit, Mr. St. John called Miss Sforzo a second time. As in the case of Miss Hilbert, Miss Sforzo apologized to Mr. St. John for giving him false information during their first conversation, She now told Mr. St. John that Swift had encouraged her to represent to Mr. St. John that she was to be an active vice president when in fact she was to be vice president in name only at a salary of one dollar.

On March 18, 1974, International filed its second application. Miss Hilbert was no longer listed as the qualifying officer and no mention was made of Miss Sforzo.

Had there been no investigation of applicant by Mr. St. John, the inescapable conclusion is that applicant would have rested on his first application and a license then granted would have been based upon the patently false statements in that application. Swift had no hand in the ultimate disclosures.

Applicant's position on the foregoing events is best presented in its own words on brief. To take the case of Miss Hilbert first:

> Hearing Counsel's allegations with respect to Miss Hilbert are to the effect that she had only 5 months vice 3 years experience in *ocean* forwarding and that Mr. Swift allegedly directed her in answering certain questions to Mr. St. John. It is to be noted that the first application (Ex. 1) listed Miss Hilbert's experience as 2 years in "*international* freight forwarding." What Miss Hilbert told Mr. St. John about her *ocean* experience is irrelevant. There is no evidence that Miss Hilbert did not have 2 years in the international freight forwarding area. This question also became moot when the second application was filed (Ex. 5) since she was no longer being considered for employment.

Several things may be said about applicant's "explanation" of the incident involving Miss Hilbert but the most striking thing about it is applicant's attitude toward it, an attitude held even now—an attitude which clearly belies any idea of the seriousness of being licensed as an ocean freight forwarder and the importance of complete candor in the licensing process. Thus, Miss Hilbert's misrepresentations become "irrelevant" since she is "no longer being considered for employment."

Moreover, applicant seems to be arguing that the reason Miss Hilbert's initial represtation to Mr. St. John are irrelevant is because on the first application her experience was "correctly" stated as two years in "international freight fowarding." While this particular point is somewhat obscure, if I understand the argument it goes somewhat like this. Miss Hilbert had at the time of the first application two years experience in "international freight forwarding." Presumably this experience was in air freight forwarding—although this does not appear in the record. Therefore, since the original description of Miss Hilbert's experience was

accurate, anything followin that statement is irrelevant because the original statement was correct.[9]

Is it really necessary to point out that the application in which the statement in question was made was an application for a license as an independent ocean freight forwarder? Is it further necessary to state that when an application for a license as an ocean freight forwarder calls for a statement of experience it is expected that the experience given will be experience in ocean forwarding? Apparently it is necessary to now make this clear to the applicant.[10]

As for the incident involving Miss Sforzo, applicant has only the following to say:

> With respect to Miss Sforzo, the alleged "fraudulent representation" according to Miss Sforzo and Mr. St. John,
>
> Q. What falsehood?
>
> A. (Mr. St. John) The falsehood that she had indicated that she would be a Vice President of the Corporation,

and again,

> . . . where in fact it was Mr. Swift's suggestion that she be Vice President in name only with a salary of one dollar.

The salary of one dollar was obviously to be in excess of whatever salary she would receive otherwise. We suggest that judicial notice be taken of the fact that a vice president title does not necessarily require a substantial salary or dollar figure.

Miss Sforzo was not even listed on *any* of the applications, and her status with respect to the pending application is moot. (Applicant's brief, page 2.)

The first thing to be noted here is that there is not one word of testimony or a single scrap of documentary evidence supporting the bald assertion that Miss Sforzo's one dollar salary "was to be in excess of whatever salary she would receive otherwise." Indeed, since she was, by her own unrebutted statement to Mr. St. John, to be a vice president "in name only" what other salary would be coming to her? And for what other duties? The applicant attempts to explain away past misrepresentations by at the very least further obfuscation, and at the worst by further misrepresentations; and here again the whole question of Miss Sforzo's status is "moot" because she is "not even listed on *any* of the applications." This is an interesting theory and under such a theory any false representation made to an official representative of the Commission is "moot" and without consequence so long as nothing concerning that representation appears on the application previously filed with the

[9] More importantly when Miss Hilbert visited Mr. St. John at the Commission's New York office she told Mr. St. John that her ocean forwarding was limited to some five months and that prior to that she had been a "dance instructor." Other than the statement appearing in the first application filed by International, the only other evidence dealing with the experience of Miss Hilbert is Swift's statement that she was employed by All-Airtransport sometime prior to November 13, 1973.

[10] There is absolutely nothing in this record to demonstrate that the applicant was trying to qualify Miss Hilbert as the corporate officer with the requisite experience on the ground that some forwarding experience other than ocean would serve as some sort of an equivalent. To the contrary it appears to represent yet another instance of a calculated lack of complete candor in dealing with the Commission.

Commission. But what are the purposes of such representations? Indeed, what was the purpose of the precise representation made here?

Quite obviously the news of Miss Sforzo's "confidentially" arranged hiring was imparted to Mr. St. John with the obvious intent of enhancing International's qualifications, namely its experience in ocean forwarding. If it was not intended that Mr. St. John rely on these representations there was of course no need to make them.

On the question of the representations concerning Swift's citizenship, it will be remembered that on the first application Swift gave his citizenship as United States with date and place of birth at "11/19/49, Galveston, Texas." On the second application citizenship, date and place of birth were given as "Mexican . . . 11/19/49, Matamoros, Mexico." On that same application Swift reported his residence as "Cleveland, Ohio, from 1949 to present." (The record shows that Swift moved from Mexico to Galveston in 1951, remained in Galveston until 1957, when he moved to Cleveland.)

Applicant deals with these inconsistencies by simply pointing out that Swift thought all along that he was an American citizen, and concludes, "But more importantly citizenship is *not* required to be a freight forwarder. To be fraud there must be a misrepresentation of a *material* fact." The fact that Swift throught he was a "citizen" does not go far in explaining how he could represent his birth as having taken place in two different countries and how he could represent that he had lived in Cleveland from the year of his birth to present. Moreover, as to his constantly held thought that he was an "American citizen," how was it he listed his citizenship as Mexican on the second application?

On International's first and second applications Rafael Swift appeared as President and sole stockholder. The record shows otherwise. As early as November 3, 1973 (the first application was filed on November 30, 1973), Swift in an affidavit stated that he held four of the six outstanding shares of International in "trust" for Ismail Renno. The shares were returnable to Renno upon demand at any time.

Applicant takes the position that the so-called "stock agreement" was merely security for a loan from Swift to Renno. The transaction is likened to borrowing from a bank and pledging the stock as collateral and it is suggested that such a transaction does not "make the bank a stockholder." This argument overlooks two very salient points. First the so-called stock agreement makes absolutely no mention of any loan for which the stock is held in "trust" as collateral. Secondly, it overlooks the Management Agreement executed on October 15, 1973, in which Renno was to receive $12,000 a year as a "Partner" in International. Finally we have the testimony of Renno himself that he and Swift individually obtained loans of $5,000 and jointly obtained a loan of $15,000 "to start the company."

There remains of course the fact that Renno's participation was not in any way reported on either the first or second application. Applicant's

argument that Renno was not a stockholder of International during the pendency of the first and second application is singularly unpersuasive. Swift's "possession" of the four shares of Renno was, whatever the technical or legalistic terminology applied, tenuous at best. But clearly they were Renno's shares held by Swift and subject to reclamation by Renno apparently at the whim of Renno. Under such circumstances, and for the purposes of the application, Renno clearly owned the stock. Moreover, I conclude that Renno's participation in the major decisions of International was in fact due to his stock ownership in International. More importantly, applicant should have apprised the Commission of the real terms of the stock distribution and of the fact that Renno indeed played a very active part in the management of the company. This situation goes beyond technicalities and legal fictions. When a person not listed anywhere on a forwarder's application has the right to demand at anytime the "return" of four of the six shares of the corporation applying for the license, the very failure to show him on the application distorts the Commission's picture of the applicant. Again applicant's position on Swift's representations to the Commission on who in fact owned and controlled the company is edifying:

> Here again intent must be examined. Mr. Renno's connection with Mr. Swift was not a material fact in the application being granted or not. *Technically*, if not legally Mr. Renno was not a "Stockholder." If he had been what would be the reason for not naming him as such? Certainly it wouldn't hurt the application. And certainly Mr. Swift didn't try to "hide" the arrangement . . . from the investigator. We submit that the arrangement was a non-material fact, that there was no fraudulent misrepresentation, *and no one was deceived by it*. (Emphasis mine.) (Applicant's brief, page 4.)

The bare facts in this record clearly demonstrate that for whatever reason Swift sought to disguise Renno's ownership and participation in the management decisions of International. Thus the first application filed after the two "agreements" between Swift and Renno, showed Swiftas President and sole stockholder of International. The application, then, clearly did not show the actual organization and management of International. Yet applicant contents himself with the explanation that no one was "deceived" and the deception did not involve a "material fact." The Commission, of course, was "deceived," and were it not for Mr. St. John's investigation, the deceit would have been perpetuated. The question of whether a material fact was involved is in applicant's frequently used word "irrelevant." I know of no Commission decisions, and none have been cited to me, dealing with misrepresentations that have held that the misrepresentations must be such as to constitute legal fraud.[11] Questions of "legal fraud," of course, have no place determining whether an applicant has been truthful in his representations to the Commission about his qualifications for a forwarder's license. Ability to

[11] Applicant's constant reference to "fraudulent misrepresentations" as legally involving representations of material fact stems quite obviously from Hearing Counsel's frequent use on brief, perhaps from a slight excess of zeal, of the term "fraudulent misrepresentations."

serve the public in an endeavor as sensitive as forwarding should not turn on nice legal distinctions.

The third application lists Mr. Dennis Costin as holder of 10 percent of the outstanding shares of International. Costin had, at the time of the third application, a "subscription agreement" which according to applicant "by operation of law legally makes him a stockholder whether or not the shares have been actually issued." Applicant cites for authority 18 Am. Jur. 2d § 465 as follows:

> To constitute a stockholder, some sort of contract, expressed or implied, is required whereby he obtains the right to hold stock or, upon some condition, demand stock and to exercise the rights of a stockholder . . . It is held that a subscription to stock in a corporation already organized by the corporation makes a subscriber a stockholder, but a contract to subscribe in the future does not make one a stockholder.

Hearing Counsel on the other hand argue that the omission of the following paragraph from the cited section of Am. Jur. § 465 results in a misstatement of the law:

> An agreement to transfer stock to a certain person at a future time does not make that person a stockholder as of the time of the agreement. Even persons holding priority rights or warrants for stock are not considered stockholders.

Hearing Counsel by way of conclusion urges that, Costin's case is but another example of ". . . the absence of forthright disclosure of [International's] ownership [which] has pervaded each of petitioner's three applications before this Commission."

While it is true that Costin has been issued no shares in International, he apparently has the right to purchase 10 percent of those shares when he can. However, under the full statement of the law quoted above, Mr. Costin was not "legally" a stockholder. He had no right to hold stock and he did not exercise the rights of a stockholder, at least so far as this record shows. He merely had an agreement which permitted him to purchase stock at some unspecified future time. However, it seems to me unnecessary to determine Mr. Costin's legal status as a stockholder or non-stockholder. It is only pertinent to point out that once again applicant has chosen to state first what it desires the Commission to know and later argue the "legalities" and "technicalities" of its representations on an application.

Applicant does not dispute that Rafael Swift was placed under an injunction by an Ohio state court, nor does he argue that Swift did not use his position with All-Airtransport to spirit away clients from All-Airtransport to International while he was still an employee of the former. Rather applicant contents itself with characterizing the lawsuit "as the usual one by a disgruntled employer." For reasons not entirely clear, applicant cites the fact that during the testimony at the trial it was alleged that after Swift's departure from All-Airtransport some pictures were missing from the walls of the office.[12] Applicant says that this is an "example" of the employer's "disgruntlement."

[12] From the transcript it would appear that the pictures were of the "promotional" type furnished by airlines.

Concerning the gravamen of the complaint and the subject of the court's judgment and injunction, applicant has only this to say:

> The complaint asked for more—$75,000.00 plus prohibiting soliciting of any of plaintiff's [Swift's employer All-Air Transport) customers. To settle for a nuisance fee of $1,000.00 and a meaningless injunction shows good business acumen of applicant.
>
> * * *
>
> Would Hearing Counsel stifle this normal competition?
> Even the president of the company (Mr. Nachbur) left and started his own company!![13] (Applicant's brief, pages 5 and 6.)

What really can be said about applicant's attitude toward his then employer or toward the law and the responsibilities imposed upon him by the law. Having been found guilty by a court of law of unlawful business practices, applicant now chooses to dismiss the court's decision as a "meaningless injunction" based upon a suit by a "disgruntled employer" and wants to know if, "Hearing Counsel stifle this *normal* competition?" (Emphasis mine.)

Normal competition does not consist of diverting shipments from an employer to someone else—to say nothing of the fact that the shipment is diverted to a company in which you have an interest; nor does normal competition include luring employees away from your own employer without even some minimal notice of intent to do so. The applicant's idea of what constitutes "normal competition" not only brings into question the business integrity of applicant but casts considerable doubt upon his awareness of and his willingness to accept the responsibilities of the preferred position of freight forwarder and should he be licensed, how would his concept of normal competition affect the conduct of his business?

Couple applicant's idea of normal competition with his notion of what constitutes business acumen and some idea of the way in which applicant views his obligations as a prospective licensed ocean forwarder can be gained. This attitude certainly does not comport with a desire to scrupulously adhere to the laws, rules and regulations governing his conduct as an independent ocean freight forwarder.

The record shows that International issued checks to J. Knott as payment for "consultative services." J. Knott, never afforded any services to International. The funds were actually for Renno. At the hearing in this proceeding, Swift first testified that J. Knott performed consultation services and referred to J. Knott as "him." Swift subsequently acknowledged that J. Knott was Renno's wife. Renno testified that J. Knott was his wife's maiden name; that she had never performed consultative services for International and that in their nine years of marriage she had never before used her maiden name in a business

[13] The record contains nothing whatsoever about the circumstances of Mr. Nachbur's resignation. The testimony of Renno concerning this incident does show that even then Renno was in close association with Swift and was advising him.

transaction. Hearing Counsel urges that this resulted in International "fraudulently" reporting "income" to the Internal Revenue Service. Applicant merely says: "What fraud. These were the amounts paid to the persons designated, deposited by them and properly reported to the IRS." It cannot, of course, on this record be determined that the reports of income to the IRS constituted "fraud" under the laws administered by the IRS. However, if Swift was willing to distort International's books and records for this purpose, it is possible to infer that he would do it for other purposes. The inference is more readily drawn when this incident is viewed in the light of the other activities of applicant spread across this record.

Finally, under the heading "Further Legal Argument" applicant urges:

> Although we do not agree that applicant was in violation of any rules or regulations for the reasons stated above, even if it was it would appear to fall within the leading case of *Bolton & Mitchell, Inc.—Independent Freight Forwarder License No. 516*, 15 F.M.C. 248 (1972).

Applicant "points out" that despite numerous violations of both the Act and the Commission's Rules and Regulations, the respondent was given a "second chance." I find that case inapposite. I do not believe that the respondent's conduct in the *Bolton & Mitchell* case, *supra*, can be equated with that of applicant in this case. In *Bolton & Mitchell, supra*, the Commission after pointing out that respondent committed a willful violation of section 16, First, of the Act, had the following to say:

> . . .Under most circumstances, wilful violations of law of the nature set forth above would be sufficient standing alone to revoke respondent's freight forwarder license. However, we note that the record establishes that Bolton & Mitchell embarked upon this illegal activity only after consultation with Counsel. While the actions of respondent are violations of law, nevertheless we are disinclined at this time to revoke respondent's license and deprive him of his livelihood when respondent appears to have acted in *good faith* upon advice of counsel. Furthermore, Bolton & Mitchell had been operating as a licensed freight forwarder for the past ten years, and formerly provided good and valuable service for approximately forty years without serious complaints. (Emphasis mine.)[14]

In *Bolton & Mitchell, supra*, the activity which was ultimately found violative of the law was at its inception at least arguably lawful, and respondent was found to have acted in good faith upon the advice of his counsel in the conduct of that activity. By contrast we have an applicant who not only itself indulged in misrepresentations to the Commission, but also induced others to do so. One does not indulge in this kind of activity in "good faith."

The record in this case shows that the applicant was less than candid—in fact the record clearly shows a number of instances when the applicant lied—and perhaps more importantly two instances when the applicant induced others to lie for him. The applicant clearly has little regard for its

[14] See also *License Application—Guy G. Sorrentino*, 15 F.M.C. 127 (1972), particularly the statements of Sorrentino at page 137 and the Commission's comments in its Adoption of the Initial Decision at page 128. A comparison of Sorrentino's posture with that of applicant here is instructive.

own reputation for veracity, and appears not to be concerned about others who would be compromised—Miss Hilbert and Miss Sfarzo.

The "explanations" offered by applicant on brief are indicative of applicant's attitude that he has done nothing wrong—even if he has done nothing right. However, applicant has in fact done a good number of things "wrong" and it ill behooves the applicant to conclude by suggesting to me on brief that:

> What possible purpose could be served by utilizing prior possible peccadillos to prevent expanded service to the shipping public?[15] (Applicant's brief, page 10.)

The record shows what the conduct of the applicant was and the final reference to that conduct as "prior possible peccadillos" is but another example of the seriousness and worth applicant attaches to his various supplications and representations to the Commission and its representatives. Even now when applicant does not, and indeed cannot, challenge the accuracy of the facts of record, the applicant merely wants to explain them away—it wants to characterize the conduct as a series of "peccadillos."

If we are to set any standards for integrity, and if we are to make any effort to insure that licensees are "fit," then the applicant here must be denied a license. To do otherwise would be (1) to condone a cavalier approach to misrepresentations made by the applicant himself; (2) to overlook the fact that he induced others to falsely represent themselves; (3) to finally accept those proven acts as "peccadillos" which should be overlooked for the sake of permitting the applicant to "provide expanded service to the shipping public"; and (4) to accept applicant's concept of "normal competition" practices which were found unlawful in open court.

One need not rehash the varied and multiple instances of the applicant's disregard of candor. The record speaks for itself. The applicant remains secure in his own knowledge that his actions constituted nothing more than "peccadillos." The applicant has at no point in this proceeding shown that he was even aware that his fabrications were of any real import nor has he shown or even hinted that he would do otherwise if he were licensed.

While the most troublesome of the activities dealt with above are more directly attributable to Swift, the record is clear that Renno was an active participant in the management of International and either was or should have been aware of the activities in question.[16] At no point in his

[15] Applicant makes brief reference to the 300 or 400 (members of the shipping public) who might want to use IFS as ocean freight forwarder. This reference is to the asserted number of persons who now use International as an air forwarder. However, applicant called not one of them to testify nor did it submit a single affidavit from one of them expressing a desire to use International as an ocean forwarder. In short we have only applicant's speculations in the record.

[16] It is really inconceivable on this record that Renno could have remained in ignorance of Swift's problems particularly in view of the three separate and distinct applications it became necessary to file with the Commission.

testimony did Renno attempt to disassociate himself from Swift or Swift't's past representations to the Commission.[17]

On the basis of the record before me and for the reasons stated, I find and conclude that applicant is unfit to "carry on the business of forwarding" within the meaning of section 44 of the Act and that therefore the application should be denied.

The Commission's Order instituting this proceeding questioned applicant's "ability" to conduct the business of forwarding.

As already noted Swift has had no actual experience in forwarding and Renno's experience was limited to one shipment which he personally handled.

However, Renno testified that there was little significant difference between the forwarding of a shipment by air and the forwarding of a shipment by water. In addition Renno has supervised the Cleveland Freight Services office in London which has forwarded shipments by water. Renno also attended a two year course in transportation at LaSalle College of which "the biggest portion was ocean freight." It is Renno's testimony that the work involved in ocean freight is less than that involved in air freight. Renno states that he is familiar with all of the documentation necessary for the successful movement of a foreign shipment. Renno also agrees should International be granted a license he will spend whatever time is necessary in International's office in Cleveland to insure that all personnel are properly trained.

In their opening brief Hearing Counsel urge that "Mr. Swift and Mr. Costin have no ocean freight forwarding experience and that Mr. Renno tried, unsuccessfully, to appear experienced beyond the one shipment he claims to have made while in England."[18] Hearing Counsel further

[17] In fact Renno himself seems to have adopted a rather curious approach to his testimony. The following colloquy took place at the hearing:

Q. Would you please describe what kind of financial arrangements exist between IFS and Cleveland Freight Services?
MR. EWERS: As of what time?
THE WITNESS: I can't understand really.
BY MR. WEINSTEIN:
Q. As of the time that IFS acquired Cleveland Freight Services?
A. Yes.
Well, I will tell you about it and if you don't like it tell me and I will change it. . . .

[18] This was elicited from Renno during the following colluquy.

Q. Mr. Renno, while you were operating in London with the company Cleveland Freight Services how many ocean shipments did you perform service on?
A. I really have no idea. Figures are very, very difficult.
Q. Approximately.
A. I would say over one.
Q. More than a hundred?
A. No, not really.
Q. More than 50?
A. Yes. Well, well I would say most of the shipments we have are on either letters of credit or legalized—well, let me tell you what accounts we have and then you make the estimate.
Q. I'm interested in exactly and not the accounts, but what services you were performing.
A. You see, Your Honor, there is something very important here. There are certain things I don't want my competitor to know about. It is unfair for example to let them know at what level we are growing at this time.

contend that International waas aware of its deficient experience because of the "outrageous conduct of Mr. Swift in encouraging one prospective employee to lie about her experience and another about her intent to become a qualifying officer of [International]." Applicant counters with the argument that Renno is "expert" in air freight forwarding and his vast experience in air shipments and his "limited" contact with the ocean field leads him to the "unrebutted" conclusion that "air and ocean are similar and that ocean shipments only require a portion of the work involved in air." Finally Hearing Counsel reply that it has "no way of knowing" whether "air and ocean are similar" for "there is no evidence of record by one competent to testify[19] to the similarity. . . ." Hearing Counsel then rest content to state that the burden to establish its experience is upon the applicant and that applicant has failed to meet that burden.

Neither counsel for applicant nor Hearing Counsel afforded me a meaningful analysis of the testimony on the issue of the applicant's experience. It is true that Renno's testimony is unrebutted, but is equally true that the distortions and misrepresentations concerning applicant's experience would appear to stem from applicant's awareness of its deficiencies as to the "necessary" experience to be licensed. The question presented here is really one of the credibility of the witness.

I have no real doubt that Renno did in fact "handle" one ocean shipment personally nor do I doubt that Renno was in charge of the London office of Cleveland Freight Services when it handled some ocean shipments as a forwarder.[20] My doubt arises when it become necessary to conclude that Renno himself is personally knowledgeable enough to take over the training of International personnel in the everyday intricacies of ocean forwarding as it must be conducted to meet the justified expectations of clients and the laws, rules and regulations of the United States and this Commission which govern those activities.[21]

Accordingly, having observed the demeanor of the witness Renno on the stand and having considered the whole of his testimony and the entire record in this case, I cannot conclude that his experience renders him sufficiently "able" to conduct the business of freight forwarding so as to be the qualifying officer for the corporate applicant. Therefore, I conclude

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And I have very, very fierce competition in England and in Cleveland. Now, I call on people for example in Paris and the rest of the places where they provide things like this and I have to be very cautious of what I am saying. I am in a situation now where I do have very hard competition. But I am willing to tell him about the accounts I do have, one of them which is Lord Corporation.

JUDGE COGRAVE: Just a minute, Mr. Renno. I think it is a legitimate inquiry to know not only that you have had experience but how much experience you have had and I think that is what counsel's question is designed to do. There is an entire difference between a man who has forwarded [many] shipments and a man who has forwarded one or don't you agree with that?

THE WITNESS: I agree with you entirely, Your Honor.

JUDGE COGRAVE: All I think we are trying to do here is arrive at some roundhouse figure that shows us how much experience you have had in the field of ocean forwarding. You have no idea?

THE WITNESS: Well, I would say one shipment I have moved myself; one shipment, Your Honor.

[19] Hearing Counsel did not at the hearing attempt to probe the specific qualifications of Renno to testify as to the similarity between ocean and air shipments.

[20] Neither the degree of supervision nor the experience of the employees supervised in the London office appears in the record.

[21] Renno's "limited contact" with ocean forwarding insofar as this record shows took place in England.

that the applicant International Freight Services is unable to conduct the business of an independent ocean freight forwarder and its application should be denied.

For the foregoing reasons I conclude that applicant, International Freight Services, Ltd., is neither fit nor able to conduct the business of forwarding and that its application for a license as an independent ocean freight forwarder should be and is denied.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
May 19, 1976.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 352(I)

ANDES PRODUCTS EXPORT-IMPORT

v.

PRUDENTIAL LINES, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

August 26, 1976

Notice is hereby given that the Commission on August 26, 1976, determined not to review the decision of the Settlement Officer in this proceeding except to make the following clarifications.

In page 2 the references to "Pencils, Not Mechanical," Class Rating I should read "Pencils Not Mechanical," Class Rating 11.

In the concluding paragraph of the Settlement Officer's decision, it is stated that the evidence substantiates the claim that the shipments were lead pencils and thus should have been rated under the specific commodity description. The specific commodity description sought to be applied, however, in not lead pencils but "Pencils, Not Mechanical." We find that the evidence substantiates the claim that the pencils were not mechanical.

By the Commission.

(S) JOSEPH C. POLKING,
Assistant Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 352(I)

ANDES PRODUCTS EXPORT-IMPORT

v.

PRUDENTIAL LINES, INC.

Reparation granted.

DECISION OF JAMES S. ONETO, SETTLEMENT OFFICER[1]

By informal complaint filed in April 1976, Andes Products Export-Import (Complainant) alleges that Predential Lines, Inc., (Respondent), a common carrier in the foreign commerce of the United States, during July and October 1974, overcharged complainant (in violation of section 18(b)(3) of the Shipping Act, 1916), on two shipments of Plast-O-Cap lead pencils in seventy-five cartons weighing 4,725 pounds from New York to Guyaquil, Ecuador. Complainant contends the shipments should have been rated on the basis of the tariff commodity description "Pencils, Not Mechanical" and not as "Pencils, N.O.S." Instead of total freight being $970.35, it is contended it should have been $699.53. Reparation in the amount of $270.82 is requested.

The shipments moved prepaid and hence are within limitations.

The bills of lading were made out by Leading Export Service Corporation, foreign freight forwarder, air freight forwarder, and freight consolidator, FMC License Number 1027. The bills of lading described the shipments as "Lead Pencils." The respondent's tariff of rates had commodity description only for "Pencils, Not Mechanical," otherwise the "Pencils, N.O.S." rate applied. The respondent, not knowing whether the pencils were mechanical or not, rated the shipments "Pencils, N.O.S."

Accordingly, the rate applied by the respondent per the bill of lading description "Lead Pencils" was "Pencils, N.O.S.," Class Rating I, in effect July 15, 1974, $130.75 W/M, and "Pencils, N.O.S.," Class Rating I, in effect October 23, 1974, $135.75 W/M. Complainant argues the

[1] Both parties having consented to the informal procedure of Rule 19 of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

proper description is "Pencils, Not Mechanical," Class Rating I, in effect July 15, 1974, $91.50 W/M, and "Pencils, Not Mechanical," Class Rating I, in effect October 23, 1974, $96.50 W/M.[2]

Complainant, by way of exculpation, argues it "has no knowledge of tariff matters and was not aware that the bill of lading description was inadequate for rating purposes." Anyway "it is not the declaration on the bill of lading but what is actually shipped that determines the applicable rate."

Respondent replies that the bills of lading furnished by the complainant described the shipment as "Lead Pencils." The attachments to the complaint were not provided respondent at the time of shipment and to require respondent or any other carrier to inquire of a shipper as to whether or not the description of cargo is correct, places an undue burden on the carrier. Respondent avers its tariffs are a matter of public record and complainant and/or its forwarding agent are expected to maintain their own expertise.

Although the complainant states the pencil manufacturer, Empire Pencil Company, has no catalog, the complainant's supplier, Cendisc Corp. states the company does not manufacture mechanical pencils and the shipments in question were wood lead pencils with erasers. The complainant has also submitted two invoices covering two shipments of Plast-O-Cap Pencils. One invoice is dated twenty-one days before the first bill of lading. The other invoice is dated contemporaneously with the second bill of lading. The weights and quantities on the invoices tally with those on the bills of lading. Further documentation is afforded by a statement from the merchandiser asserting that the shipments of two consignments of Plast-O-Cap Pencils were made on the relevant dates to the complainant.

The applicable law in these misclassification disputes is only partially quoted by the complainant.[3] What was not mentioned was the counterpart to the statement "what is actually shipped determines the applicable rate." That is where the shipment has left the custody of the carrier and the carrier is thereby prevented from verifying the claimant's contentions, the claimant has a heavy ultimate burden of proof to establish his claim. The rationale underlying the heavy burden of proof requirement in these misclassification cases is simply that there is no practical way to effectively check the contents of shipper loaded/consignee unloaded containers unless each and every container is stripped and its contents examined piecemeal while in the carrier's possession.

Although respondent's argument that forcing the carrier to inquire of the shipper whether or not the description of cargo is correct places an undue burden on the carrier, is a compelling plea on equitable grounds, it is not a cognizable legal defense. This agency cannot consider arguments addressed to equitable considerations in matters arising under section

[2] All rates from Atlantic and Gulf/West Coast of South America Conference Tariff.
[3] Docket No. 383(I)—*Western Publishing Co., Inc. v. Hapag Lloyd A. G.*, 13 SRR 16 (1972).

18(b)(3) of the Shipping Act.[4] Moreover although the ocean freight forwarder would appear to be at least in *pari delicto* with the carrier, nevertheless as the freight forwarder's deliquencies are also not within the stricture of section 18(b)(3) of the Shipping Act, it may not be called to account, at least not before this forum.

Therefore, on the basis of the invoices and statements submitted, it is found that an adequate substantiation of the complainant's claim that the shipments were lead pencils has been established. Thus, since the shipments consisted of lead pencils, they should have been rated under the specific commodity description and accordingly reparation in the amount of $270.82 is awarded.

(S) JAMES S. ONETO,
Settlement Officer.

[4] *Mueller v. Peralta Shipping Corp.*, 8 F.M.C. 361 (1965).

FEDERAL MARITIME COMMISSION

DOCKET NO. 69-57

AGREEMENT NO. T-2336—NEW YORK SHIPPING ASSOCIATION COOPERATIVE WORKING ARRANGEMENT

NOS. 71-2, 71-8, 71-26, AND 71-34

TRANSAMERICAN TRAILER TRANSPORT, INC., SEATRAIN LINES, INC., DANIELS & KENNEDY, INC., CHANDRIS AMERICA LINES, INC., GREEK LINE, INC., HOME LINE AGENCY, INC., I NCRES LINE

THE NEW YORK SHIPPING ASSOCIATION, INC.

v.

Claim of States Marine Group, consisting of 12 break-bulk lines, against New York Shipping Association, based upon overassessments for the benefits for longshoremen for the 1969–1971 period found justified in amount of $689,599. New York Shipping Association directed to satisfy claim and notify Commission of method of satisfaction, or establish, with the concurrence of the Group, and advise of, the method of satisfaction, within 60 days. Provisions made for filing of additional claims by other persons seeking refund for 1969–1971 period.

C. P. Lambos and *Donato Caruso* for Respondents, the New York Shipping Association and its members.

Stanley O. Sher and *Jacob P. Billig* for Interveners, States Marine International, Inc., Isthmian Lines, Prudential Lines, Inc., Atlanttrafik, Barber Lines, Blue Sea Line, Concordia Line, Hellenic Lines, Hoegh Lines, Meyer Line, Nedlloyd Line and Norwegian America Line.

Ronald A. Capone and *Stuart S. Dye* for Intervener and Complainant, Transamerican Trailer Transport, Inc.

Neal M. Mayer for Intervener and Complainant Seatrain Lines, Inc.

Gerald A. Malia for Intervener, Sea-Land Service, Inc.

Alan F. Wohlstetter for Intervener, Wallenius Line.

Herbert Rubin, Cecelia H. Goetz and *Alan A. D'Ambrosio* for Intervener, Wolfsburger Transport-Gesellschaft m.b.H.

Joseph F. Kelly, Jr. for Complainant, Daniels & Kennedy, Inc., and for Intervener, the Madden Corporation.

Samuel H. Moerman for Intervener, the Port Authority of New York and New Jersey.

Mario Escudero for Intervener, the Commonwealth of Puerto Rico.
Donald J. Brunner and *Paul J. Kaller* as Hearing Counsel.

REPORT

September 14, 1976

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* James V. Day and Bob Casey, *Commissioners*. Clarence Morse, *Vice Chairman*, and Ashton C. Barrett, *Commissioner*, concurring and dissenting.)

This is the final phase of protracted and complex litigation arising out of disputes as to the proper method to be utilized by the New York Shipping Association, Inc. (NYSA), an organization composed of water carriers, terminal operators, and stevedores, serving the Port of New York, for assessment for the period October 1, 1969–September 30, 1971 of cargo moving through that port in order to meet certain benefit payments for which NYSA is obligated under a collective bargaining agreement with the International Longshoremen's Association, AFL-CIO (ILA).[1]

On June 9, 1972, after two Initial Decisions by Administrative Law Judge Charles E. Morgan (Judge Morgan or the ALJ), and a prior Report and Order of our own, we approved a formula for the assessment of the longshoremen's benefits. (See *Agreement No. T-2336—New York Shipping Association*, 15 F.M.C. 259 (1972)).[2] This action was subsequently affirmed by the Court of Appeals for the District of Columbia Circuit. *Transamerican Trailer Transport, Inc. v. F.M.C.*, 160 U.S. App. D.C. 351, 492 F.2d 617 (1974) (*Transamerican*).

Our decision in 15 F.M.C. did not, however, resolve all of the problems relating to the assessments. When this proceeding was instituted, we granted an interim "conditional approval" to the assessment formula proposed by NYSA to enable payments to be made to the ILA so as not to jeopardize the bargained-for benefits. The "condition" was that the approval was subject to such "adjustments and conditions" which the Commission might, after hearing, impose in determining a reasonable formula for allocating assessments on different categories of cargo. (See Order of March 11, 1970).

The assessment formula approved in 15 F.M.C. 259 differed substantially from that to which we had granted interim conditional approval. Under the interim agreement, with certain exceptions not here relevant, all categories of cargo were assessed alike on a basis including both "tonnage" and "manhour" factors. Direct employers of longshore labor (*i.e.*, stevedores and terminal operators) paid assessments on a manhour basis, while carriers paid on a tonnage basis. Under the modified formula

[1] Generally, where reference herein is made to assessment periods by years only, such as 1969–1971, this is meant to cover the periods beginning October 1, and ending September 30.
[2] Our Earlier Report and Order appears at 14 F.M.C. 94 (1970).

approved in our original Report (at 14 F.M.C. 94), cargo carried in the Puerto Rican trade was given "excepted" status, *i.e.*, was excepted from the manhour/tonnage basis and assessed for both direct employer and carrier contributions only on a manhour basis. Under the modified formula approved in our second Report, and affirmed by the Court of Appeals in *Transamerican*, the Puerto Rican trade was given "excepted" status with respect to some benefits (those funded for pensions, welfare and clinics), but carriers in that trade were required to pay the costs of Guaranteed Annual Income (GAI) on the regular tonnage basis in the proportion Puerto Rican tonnage bore to total tonnage. Newsprint was given treatment similar to cargo in the Puerto Rican trade, and automobiles were assessed under the manhour/tonnage formula on a weight basis rather than on the basis of 20% of cubic measurement as had been the prior case.

We recognized that our decision approving the modified formula would "necessitate many assessment adjustments—that simply cannot be helped—for these adjustments are ordered on the record established in this proceeding only, and will not have application to additional assessment proceedings, if any, initiated in the future." (15 F.M.C. at 282.) Adjustments were particularly required in the case of the carriers operating in the Puerto Rican trade (the Puerto Rican carriers), which had been paying assessments on the "excepted" basis adopted by the Commission in its first decision. NYSA was ordered to accomplish the adjustments in the assessments which were made necessary by the terms and conditions of approval granted to the assessment agreement, Agreement No. T–2390 (15 F.M.C. at 287).[3] When the parties were unable to agree on the specific amounts of adjustments or the manner of implementing the required adjustments, the matter was referred to Judge Morgan for the purpose of determining the amounts and "resolving the manner and method adopted by NYSA to accomplish the adjustments. . . ."

While the assessment adjustment implementation proceeding was pending before Judge Morgan, NYSA and the ILA negotiated settlement agreements with the newsprint and automobile interests and the Puerto Rican carriers. These settlement agreements related both to the 1969–1971 assessment period which is the subject of this proceeding and the assessment periods for 1971–1974 (covered by Agreement No. T–2804) and 1974–1977 (covered by Agreement No. T–3007).

NYSA and ILA (which had become a party to the assessment agreements for the two later time periods) agreed that newsprint would be assessed on a manhour/ton basis during 1971–1974 and on a completely "excepted" basis during 1974–1977. In return newsprint agreed to drop any claims for adjustments it may have had arising out of the Commission-

[3] The style of this proceeding refers not to the agreement actually in issue but an earlier agreement which was replaced by Agreement No. T–2390.

ordered modification of Agreement No. T–2390 or with respect to No. T–2804. The automobile interests agreed with NYSA and ILA to assessment on a 14% measurement ton assessment basis (*i.e.*, somewhere between the original 20% measurement ton basis of T–2390 and the weight basis ordered by the Commission) for the 1971–1974 period and a weight ton basis for a full tonnage assessment for the 1974–1977 period. NYSA agreed to assessment for the 1969–1971 period on the weight ton basis prescribed by the Commission and credited the automobile interests with $165,051, the difference between assessments on the basis approved by the Commission and that upon which they had actually been made. Newsprint, automobiles, NYSA, and ILA stated in their settlement agreements that these agreements settled all issues with respect to the assessment formulas for the three assessment periods as between themselves. The settlement agreements were approved by the Commission.

The Puerto Rican carriers agreed with NYSA and the ILA to assessment on a manhour/tonnage basis for the 1971–1974 assessment period and a full tonnage assessment for the 1974–1977 assessment period.[4] NYSA agreed to give up its right to recover the monies due it from the Puerto Rican carriers under the Commission's second decision in this proceeding. This agreement was also approved by the Commission, but with the "condition" that the settlement with the Puerto Rican carriers "shall in no way affect or diminish the rights of States Marine International, Inc. et al. [twelve breakbulk carriers operating in foreign commerce who were seeking assessment adjustments before Judge Morgan (hereinafter the States Marine Group)[5]] to refunds under Agreement No. T–2390 and/or arising out of Docket No. 69–57." We explained, in granting the "approval with condition" that "the manner of 'assessment adjustment' necessary to satisfy the claims of States, *et al.*, as well as the amounts to be paid, are the subject of the implementation phase of our Docket No. 69–57 and will be decided therein."

The Initial Decision

In his Initial Decision, Judge Morgan found the claim of the States Marine Group for refunds based upon alleged overassessments during the 1969–1971 period "unjustified and completely without merit." He further found that, to the extent the States Marine Group seeks recovery against the three carriers in the Puerto Rican trade whose underpayments are the basis for the States Marine Group's claims, such recovery is barred by the provision of section 22, Shipping Act, 1916, requiring that actions for reparation be filed within two years of the accrual of the cause of action.

[4] Under Agreement No. T–3007 assessments for the 1974–1977 period were assessed only against carriers, the manhour assessment against the direct labor employer embodied in the prior assessment agreements having been dropped.

[5] These carriers are States Marine International, Inc., Isthmian Lines, Prudential Lines, Inc., Atlanttrafik, Barber Lines, Blue Sea Line, Concordia Line, Hellenic Lines, Hoegh Lines, Meyer Line, Nedlloyd Line and Norwegian America Line.

The ALJ first of all determined that the Commission in its two earlier decisions in this proceeding "approved" the combination manhour/tonnage assessment of the breakbulk cargo carried by the States Marine Group because it directed no change in such assessment basis, and that "this assessment basis for the States Marine Group was affirmed" in *Transamerican*. Judge Morgan then stated that the Commission never found that the States Marine Group had been overassessed, and that the major issue in the Commission's prior actions in this proceeding was the proper assessment for the Puerto Rican carriers, the automobile interests, and the newsprint interests. The ALJ also maintained that in order to grant refunds to the States Marine Group, the Commission would have to give similar refunds to all carriers of breakbulk cargo that had been assessed on the regular man-hours/tonnage basis, totaling about $28,000,000, which would in turn require increases in the present tonnage assessments that would be likely to result in cargo diversions away from the port of New York.

If in fact the States Marine Group was overassessed during the 1969–1971 period, Judge Morgan contended, then it was compensated by its assessment treatment during the 1971–1974 and 1974–1977 periods. Insofar as the 1971–1974 period is concerned, Judge Morgan found that the States Marine Group obtained a reduction in assessments by virtue of the Puerto Rican carriers' acceptance of assessment on the man-hour/tonnage basis during that period, which resulted in increased assessments on the Puerto Rican carriers. The increased assessments on the Puerto Rican carriers created, the ALJ asserted, a savings to the States Marine Group of about $750,000, which more than offsets the claimed $715,000 overassessment of that group for the 1969–1971 period.

Discussion and Conclusions

The States Marine Group and Hearing Counsel have excepted to the ALJ's denial of the claim of the States Marine Group, while NYSA and the Puerto Rican carriers support such denial. We turn now to the positions of the parties with respect to the individual issues for resolution raised by the exceptions to Judge Morgan's Initial Decision and the replies thereto.[6]

[6] The States Marine Group had maintained before the ALJ that it was entitled, as part of its refund claim, to a share of an alleged "surplus" in the assessment fund at the end of the 1969–1971 assessment period. The ALJ denied this part of the claim on the grounds that the alleged surplus claim was not raised at hearing or made the subject of proof and that, in any case, the "surplus" was merely the result of imprecise prediction as to amounts which would have to be expended during the assessment period and have since been expended to meet NYSA's continuing fringe benefit obligations. To the extent there was a "surplus" at the end of the 1969–1971 period, such surplus merely indicated that the amounts payable by longshore employers for the 1969–1971 period had more than been met. All funds received by NYSA are not held but promptly expended to pay fringe benefit obligations for succeeding assessment periods. Assessments with respect to these later periods are the subject matter of other proceedings, in which the States Marine Group has chosen not to participate. In its exceptions, the States Marine Group itself states, ". . . we recognize that, strictly speaking, the surplus arises to some extent from NYSA's miscalculations. In this forum, and under the assumptions the refunds will be made, we do not at this time press the surplus issue."

I. The Alleged Overassessment of the States Marine Group During the 1969–1971 Assessment Period

We agree with the States Marine Group and Hearing Counsel that the ALJ erred in finding that the Commission has not already determined that the States Marine Group had been overassessed for the 1969–1971 period. We have specifically found, in our Report and Order of June 14, 1972 (15 F.M.C. at 275), that the improper basis of assessment for the Puerto Rican carriers had resulted in the underassessment of that group. It necessarily follows, since the total assessment obligation is fixed, that the States Marine Group was overassessed. We also specifically found, moreover (at 15 F.M.C. 275), that the "underassessment of the Puerto Rican trade" resulted in the "glaring inequity" of shifting "some $6 million in costs to the remaining carriers," among which, of course, are the States Marine Group. The earlier phases of this proceeding were designed solely to determine the proper bases of assessments for different categories of cargo. The fact that we did not, in such earlier phases, require an adjustment of the tonnage/manhour basis upon which the States Marine Group's cargo was assessed, as we had done with respect to automobiles, newsprint and Puerto Rican trade cargoes, does not mean that in implementing our order requiring adjustments of assessments the breakbulk carriers cannot be compensated for overassessments caused by underassessments on the Puerto Rican carriers.

II. The Amount of the States Marine Group Overassessment

Although NYSA does not agree that it has any liability to the States Marine Group with respect to the 1969–1971 assessment period, it is in substantial agreement with the States Marine Group as to what the dollar amount of the Group's claim would be, if valid. Basically, the methodology used by the States Marine Group in computing the claim was to take the difference between the dollar amount of the assessments due from the Puerto Rican carriers for GAI on the tonnage basis approved by the Commission (see page 3, *supra*) and the "excepted" basis on which such payments had actually been made, and then to determine the amount due each member of the States Marine Group by multiplying the amount still owing from the Puerto Rican carriers by the percentage each carrier in the States Marine Group has borne of total tonnage assessments. NYSA maintains that, if this methodology were used, the amount of the States Marine Group's claim should be reduced by the net effect of the automobile credit adjustments for the 1969–1971 period made as a result of the automobile settlement.[7]

We agree with NYSA that, in computing any liability to the States Marine Group, account must be taken of any valid claims that reduce the

[7] Although the difference between the total liability to all carriers of the States Marine Group as computed by the Group and as reduced by NYSA is, as Judge Morgan observed, "relatively small," i.e., $715,621 as opposed to $689,599, the exact amount of such liability becomes important here since we, unlike the ALJ, find that NYSA in fact has such liability.

size of the liability against which the States Marine Group's claims are to be offset. The present amount of such total liability, i.e., the underassessment of the Puerto Rican carriers for the 1969–1971 period, has, by virtue of Commission-approved settlement (see pages 4–5, *supra*), been reduced by credits by NYSA to the automobile interests to effectuate the adjustments required by our order at 15 F.M.C. 287. As thus reduced, the amount of overassessments against the members of the States Marine Group are as follows:

Total States Marine Group Overpayment October 1, 1969-September 30, 1971:	
	$5,004,344 (Puerto Rican carrier underpayment) less
$689,599	$ 165,051 (automobile credit) multiplied by
	14.3% (% of States Marine Group's assessments vis-a-vis total tonnage assessments)
Overpayment of each member of States Marine Group 1969–1971:	
Norwegian America Line	$ 14,518 (.30% of total tonnage)
Atlanttrafik	10,646 (.22% of total tonnage)
Nedlloyd & Hoegh Lines	17,905 (.37% of total tonnage)
Hellenic Lines Ltd.	29,520 (.61% of total tonnage)
Concordia Line	62,911 (1.30% of total tonnage)
Blue Sea Line	8,711 (.18% of total tonnage)
Barber Steamship Lines, Inc.	94,850 (1.96% of total tonnage)
States Marine International, Inc. and Isthmian Lines	103,077 (2.13% of total tonnage)
Meyer Line	114,207 (2.36% of total tonnage)
Prudential Grace Steamship Co. (now Prudential Lines, Inc.)	233,254 (4.82% of total tonnage)

III. The Alleged "Satisfaction" of the States Marine Group's Claims by Virtue of the Group's Assessment Treatment During the 1971–1974 and 1974–1977 Assessment Periods

Hearing Counsel and the States Marine Group maintain that the ALJ erred in concluding that even if the States Marine Group had been overassessed during the 1969–1971 period, it was "compensated" by its treatment during the following two assessment periods. We agree.

As we stressed in our second Report in this proceeding, assessment adjustments "are ordered on the record established" in a particular assessment proceeding, and do "not have application to additional assessment proceedings, if any, initiated in the future." (15 F.M.C. at 282.) Once liability for overassessments has been established, it cannot be removed by contentions that, since assessments are raised continuously over successive periods, all periods must be considered in determining assessment liabilities. Under such a theory, assessment adjustments which the Commission had found to be required by law could be postponed indefinitely in light of the possibility that shifting liabilities for succeeding assessment periods would "even-out" liabilities for prior periods, and the approval which we originally granted to the assessment agreement

embodied in No. T-2390 upon the "condition" that "any and all adjustments and conditions as shall be ordered by the Commission in its final disposition of this proceeding" would be rendered meaningless. If one determined to be entitled to adjustments because of overassessment during a certain assessment period were not given such adjustments promptly, the result, in Hearing Counsel's words, ". . . would make a mockery of the Commission's conditional approval . . . as well as its ability to evoke confidence in the use of this device when deemed necessary to the public interest in the future."

On the other hand, since payments are made for benefit funds on a continuing basis over many assessment periods, it is arguable that liability to certain carriers for overpayment for earlier periods could be discharged by assessment reductions for later periods. Such an approach has been used by NYSA in the past and is the basis for the settlement with the automobile interests herein. Assessment of the automobile interests on the basis prescribed by the Commission for 1969–1971, which was one of the bases of the settlement, was achieved through credits for the automobile interests against payments for the 1971–1974 period. (See pages 4–5, *supra*.) NYSA contends that, insofar as the States Marine Group is concerned, its claim has been discharged because increased payments by the Puerto Rican carriers for the 1971–1974 assessment period have fully compensated the States Marine Group for any overpayments for the 1969–1971 period.

The "compensation" offered the States Marine Group is, however, totally unlike that given the automobile carriers. Specific credits were given the automobile carriers for overassessments, while the States Marine Group is asked to accept compensation not based on actual credits, but upon an alleged reduced assessment it has been given in a later assessment period.

Ordinarily we would be reluctant to pursue NYSA's contention that the States Marine Group may be compensated for claims relating to overassessment in an earlier period, not by credits, but by alleged reductions for later periods flowing from the assessment formula for a later assessment period. Such contentions have the same basic fault as the position that liability for a single contract period cannot be considered by itself, namely, that the payment of just claims could be postponed indefinitely. Here, however, where the period upon which the alleged "compensation" is based, i.e. 1971–1974, is past and all relevant assignment figures with respect to it are of record herein, we will examine NYSA's contention.

The problem with NYSA's argument is that it rests upon many integral assumptions, none of which has been or can be proved in the context of this proceeding. These assumptions are: (1) that if the assessment formula for the 1971–1974 period had been litigated, the Puerto Rican carriers would have been found to have been overassessed by virtue of the shift to the tonnage basis embodied in the Puerto Rican carrier/NYSA settlement agreement; (2) that by virtue of this fact, the States Marine

Group was underassessed; and (3) that the underassessment of the States Marine Group during the 1971–1974 period exceeded any overassessment of that group during the preceding period, thus wiping out the States Marine Group's claim.

Perhaps the weakest link in NYSA's argumentative chain is its assumption as to what would have happened with respect to the assessment for cargo in the Puerto Rican trade if the assessment formula for the 1971–1974 period had been litigated. The context in which the assessment formulas for Puerto Rican cargo for the 1971–1974 and 1974–1977 periods were approved was one of settlement. As stated in our order of conditional approval of the agreement between NYSA, the ILA, and the Puerto Rico carriers for assessments for those periods, we approved that agreement because "the parties' approach to settlement of the rights and obligations between and among themselves does not appear to be improper. . . ." Considerations underlying settlements do not necessarily coincide with the process of making findings on a record in a litigated proceeding. See *Agreement No. T–2635–2—Pacific Maritime Association Final Pay Guarantee Plan*, 16 S.R.R. 103, 132–133 (1975).[8] Moreover, although our decision in this proceeding in 15 F.M.C. establishing the assessment formula for the Puerto Rican carriers can be said to have some significance for the future, it has such significance only to the extent that the facts and circumstances are the same in the "future" (i.e., 1971–1974, 1974–1977) as they were in 1969–1971. As we said in 15 F.M.C. (at 282), "We should also point out that our decision, of course, applies only to the obligations arising under Agreement T–2390 and the particular collective bargaining agreement which created the benefits to be funded." "We cannot assume, absent findings on a record, that conditions are the same now as they were with respect to Agreement T–2390. . . ."[9]

To the extent that the record in this proceeding shows anything about the application of the formula adopted by the Commission for the Puerto Rican carriers for the 1969–1971 assessment period to the later periods, it would appear to lend significant support to the argument that, if the matter had been litigated, such application would not have been made.[10] In both of his Initial Decisions in this proceeding, Judge Morgan noted the likelihood that a "whole tonnage" formula of the type we have approved for the 1974–1977 period (see page 5, *supra*) would be the appropriate and lawful form of assessment for *all* categories in the

[8] Nothing we say herein is to be construed as casting doubt upon the validity of the Puerto Rican carrier or other approved settlement agreements as between the parties thereto. By virtue of those agreements, the parties have resolved their differences in a manner which we have found to be proper. Regardless of how the issues with regard to the assessments for the 1971–1974 and 1974–1977 periods may have been resolved if they had been fully litigated, the parties to the settlement agreements exercised good faith in attempting to predict rights and liabilities and cannot be faulted in desiring that, as between themselves, assessment litigation should cease.

[9] See Order of Investigation and Hearing on Agreement No. T–3007 (covering the 1974–1977 assessment period), page 3, served November 1, 1974.

[10] We take no position as to what Puerto Rican assessment formula would have been approved for the 1971–1974 and 1974–1977 periods if these matters had been litigated. We wish only to highlight the highly speculative nature of predictions in this regard.

future.[11] We, furthermore, relied, at least in part, in establishing the partial exemption of the Puerto Rican cargo from the tonnage portion of the assessments for the 1969–1971 period on the ground that such partial exemption would prevent "impos[ing] on the Puerto Rican trade at this time an unnecessarily severe increase in costs. . . ." (15 F.M.C. at 265.)[12] Prior to 1969, NYSA collected all benefit assessments on a manhour basis. See 15 F.M.C. at 291–292. Since the Puerto Rican carrier assessment formula approved for the 1969–1971 period imposes cost burdens somewhere between those of the excepted, i.e., manhour, assessment level and the manhour/ton or whole ton level, the shift to manhour/tons and whole tons embodied in the agreements covering 1971–1974 and 1974–1977, respectively, would have been much less severe and may have suggested a different result in the Commission's determinations.

Since it cannot be shown that the Puerto Rican carriers were overassessed for the 1971–1974 period, it follows, *ipso facto*, that the States Marine Group cannot be shown to have been underassessed by virtue of such overassessment.

Although the States Marine Group never challenged the assessment formula as it applied to breakbulk cargo for the 1971–1974 period before the Commission, the record is not without evidence suggesting that even if the Puerto Rican assessment formula did not result in overassessment for Puerto Rican cargoes during 1971–1974, the States Marine Group may still have been overassessed during that period. The presidents of both NYSA and the ILA testified that they felt the assessments during this period were unfair to the breakbulk carriers, and this was also the view of an independent labor arbitrator who, however, lacked jurisdiction to alter the assessment formula.

Insofar as the 1974–1977 assessment period is concerned, the president of NYSA testified that the assessment on breakbulk cargo embodied in the agreement for that period reflected only that to which the breakbulk carriers were already entitled as "fair and equitable." The president of the ILA testified that he felt the formula for 1974–1977, although more equitable than those of earlier periods, should have been even more favorable to breakbulk cargoes.

The implication of all of this is that, rather than reimburse the States Marine Group for claims for overassessment during the 1969–1971 period, the assessments upon it during the later periods may themselves have

[11] " 'Hours' was the key in the past. 'Tons' will be the key in the future. In the present a combination of tons and hours is the key. Agreement No. T-2390 is a combination of tons and hours. It places some of the assessment costs on a man-hours basis, and some on a tons basis. In other words, it is a compromise solution." 15 F.M.C. at 293. "The time probably will come sometime in the future when the whole tonnage formula will not only be reasonable and lawful, but also acceptable to substantially all elements of NYSA." 14 F.M.C. at 146.

[12] See also: "[The Puerto Rican assessment formula] not only requires the Puerto Rican trade, like all others, to contribute toward the industry problem of escalating GAI costs in an adequate fashion but also *cushions the trade against the severe increase in costs for containerized operations which results from a shift from a strictly man-hours basis of assessment to tonnage*." (15 F.M.C. 272.) (Emphasis supplied.) ". . . We are convinced that the proposals [adopted] . . . not only have substantial record support but also obtain a reasonable degree of relating benefits derived to the costs imposed, *including a reduction of the severity of costs* to these parties had we adopted the examiner's decision." (15 F.M.C. 282.) (Emphasis supplied.)

been too high or may only have been what they should have been based upon the weighing of relative benefits and burdens for that period. We do not say that this is necessarily the case. We do, however, stress that such possibility as shown by the records herein hardly supports NYSA's contention that assessments on the States Marine Group during the later periods "compensated" it for any overassessments which may have been made in the 1969–1971 period.

The mathematical computation engaged in by NYSA with respect to the assessments levied against the States Marine Group for the 1969–1971 period as compared with the assessments levied against the Group for the 1971–1974 period is faultless as a mathematical computation. It does indeed show, as NYSA contends, that assessments against the Puerto Rican trade on the manhour/ton basis for 1971–1974 did result in an assessment against the States Marine Group as a whole of $749,334 less than would have been the case if the Puerto Rican trade had been assessed on the basis established by the Commission for the Puerto Rican carriers for the 1969–1971 period, and that the $749,334 figure is larger than either the $715,621 claimed by the States Marine Group or the $689,599 we here find to be the proper amount of the claim. NYSA is faced with the difficulty, however, that the record herein will support neither the conclusion that the Puerto Rican carriers were overassessed for the 1971–1974 period nor the finding that the States Marine Group was underassessed for that period, and in fact suggests that the contrary may be the case. Thus the mathematical computation must remain a mere exercise in arithmetic insofar as its utility in this proceeding is concerned.

We conclude that the States Marine Group's claim for overassessment during the 1969–1971 assessment period has not been satisfied by virtue of the Group's assessment treatment during the 1971–1974 and 1974–1977 assessment periods.

IV. The Alleged Agreement Not to Pursue or Waiver of the States Marine Group's Claim

Even though an unsatisfied claim of the States Marine Group may have existed with respect to the overassessment it bore for the 1969–1971 assessment period, such claim may, as NYSA asserts and as the States Marine Group and Hearing Counsel deny, have been relinquished by the Group's agreement not to pursue it or by its waiver of the claim. We find, however, upon careful examination of the record herein, nothing which convinces us that such agreement or waiver has taken place, and much which convinces us that it has not.

Certainly the Puerto Rican settlement itself cannot be said in any way to constitute a waiver or settlement of the States Marine Group's claim. That agreement specifically recognizes, as do the automobile and newsprint settlement agreements, the possibility of "the continuance of . . . [the] litigation [in this proceeding] by other parties," and our approval of the Puerto Rican settlement was specifically conditioned upon the

preservation of "the rights of States Marine International, Inc., *et al.*, to refunds under Agreement No. T-2390 and/or arising out of Docket No. 69-57." Moreover, the States Marine Group's conduct with respect to its claim is entirely consistent with its position that such claim was never waived or settled. The States Marine Group has consistently maintained, from 1972 to the present time, by means of formal pleadings and representations of counsel in this proceeding, statements to NYSA representatives, formal representations to the NYSA-ILA Contract Board, and letters to the entire industry, that it intended to pursue and was pursing its claim for refunds. Furthermore, counsel for NYSA informed NYSA's board of directors, shortly before the whole tonnage formula had been adopted and the Puerto Rican settlement had been agreed to between the parties thereto, that breakbulk carriers might, in spite of the settlement, nevertheless proceed with their refund claims. Although the representative of the States Marine Group on NYSA's board of directors voted to approve the Puerto Rican settlement, he at that time "expressed that this would not affect in any way the break bulk carriers' interests," and voted against a board resolution to deny claims of breakbulk carriers arising out of this proceeding.[13]

As evidence in support of the alleged settlement or waiver of the States Marine Group's claim, NYSA relies upon testimony of representatives of NYSA and the ILA and some documentary evidence intended to show their understanding that the Puerto Rican and other settlements would and should bar the States Marine Group's claim and upon the by-laws of NYSA. The record is not completely clear with respect to the extent that the positions of NYSA and ILA that refunds should not be paid were communicated to the States Marine Group, but even assuming that all such communications were made to and fully understood by the States Marine Group, they can hardly be viewed as constituting either a satisfaction of the Group's claim, in view of the language in all the settlement agreements referring to the continuance of this proceeding by other parties and our order preserving the Group's claim, nor a waiver of the claim, in view of the persistent prosecution of that claim by the Group.[14]

[13] Similarly, the mere fact that representatives of breakbulk carriers were, due to their insistence, granted places on the ILA-NYSA Contract Board, NYSA Negotiating Committee, and NYSA Internal Assessment Committee in 1974 and participated in the formulation of the full tonnage assessment basis for the 1974-1977 period and the Puerto Rican carrier and other settlement agreements hardly demonstrates a settlement or waiver of the States Marine Group's claims.

[14] It is particularly difficult to see how the ILA position can affect the claim when it is remembered that the ILA was not a party to the assessment agreement for the 1969-1971 period out of which the claim arises. We note in this regard the decision issued on August 27, 1976, by the Court of Appeals for the District of Columbia Circuit in *Pacific Maritime Association and International Longshoremen's and Warehousemen's Union v. FMC & USA*, Nos. 75-1140 and 75-1215, in which the court held that the Commission lacked preimplementation approval authority under section 15 of the Shipping Act, 1916 over any agreements between labor and management, contrary to the holding of the Court of Appeals for the Second Circuit in *New York Shipping Association, Inc. v. FMC*, 495 F.2d 1215 (2nd Cir. 1974), *cert. den.*, 419 U.S. 964 (1974). While we are seeking review of the D.C. Circuit's decision, that decision does not affect the Commission's action in the subject proceedings. As the D.C. Circuit itself observed, it has affirmed the Commission's jurisdiction over the Agreement here in issue, T-2390, in *Transamerican*, and that Agreement deals only with obligations between employers, "not . . . [those] negotiated between union and the multi-employer unit." (See fn. 33).

The by-laws of NYSA authorize NYSA to represent its members solely with respect to actions against labor organizations and officials, and the organization's purposes are restricted to "labor relations matters." Moreover, the president of NYSA testified that he, speaking for NYSA, had no authority to settle the States Marine Group's claims if the Group did not wish to settle its claims because "it takes two to tango." The presence of a majority vote provision in the bylaws and the fact that all but one of the Board of Directors voted to deny the States Marine Group's claim does not in any way militate against the viability of the claim where the action on the claim appears, both from the literal language of the bylaws and NYSA's president's admission, to be *ultra vires*, and where the representative of the States Marine Group voted against denial of the claim.

We further note the additional facts that there is no evidence that the Group or its members ever authorized anyone to settle such claim, that nothing resembling a settlement has been produced on the record here, and that, perforce, no such settlement has been approved by us as is required by section 15 of the Shipping Act and as was done with respect to the settlements with the other interests with which NYSA has reached agreements, i.e., the Puerto Rican carriers, newsprint, and automobiles. When all of the above matters with respect to the question of the existence of an agreement not to pursue or a waiver of the States Marine Group's claim are weighed, together with these additional facts, we can only conclude that the States Marine Group has not in any way agreed not to pursue or waived its claim for assessment adjustments arising out of our decision in 15 F.M.C. in the earlier stages of this proceeding.

NYSA remains liable for the satisfaction of such claim. NYSA is itself an entity subject to the Shipping Act (See *New York Shipping Association*, 16 F.M.C. 381, 387–389 (1973), affirmed *sub nom. New York Shipping Association, Inc. v. FMC*, 495 F.2d 1215 (2nd Cir. 1974), *cert. den.* 419 U.S. 964 (1974); see also *United Stevedoring Corp. v. Boston Shipping Assoc.*, 16 F.M.C. 7, 9–10 (1972) and bears the responsibility to make such adjustments as are necessary to implement our approval of Agreement No. T–2390. (See 15 F.M.C. 282, 287.) Whatever effect the various Commission-approved settlement agreements may have as between the parties thereto (see footnote 8, *supra*), they cannot, as we specified in the order conditionally approving the Puerto Rican carrier settlement, and as NYSA itself unconsciously suggests, affect the rights of the States Marine Group.[15]

V. The Claim For Interest on the Refunds Due the States Marine Group

The States Marine Group claims interest as a part of the outstanding liability with respect to the 1969–1971 assessment period. It accuses

[15] As noted at pages 16-17, *supra*, in both its deliberations on, and in the language of, the settlement agreements themselves, there is an acknowledgement on the part of NYSA that parties to this proceeding could continue the litigation in spite of the settlements.

NYSA and the Puerto Rican carriers of engaging in "delaying tactics" and suggests two percent per month as the measure of interest since this is the rate NYSA charges carriers for late payment of assessments.[16] The Group states, however, that the "rate of interest is not as important as the 'principle': There must be some cost to those who hold another's funds for such a protracted period." We feel that the claim for interest should be denied.

The decision whether or not to grant interest as a part of the States Marine Group's recovery is one within our discretion (See *Flota Mercante Grancolombiana v. FMC*, 373 F.2d 674, 681 (D.C. Cir. 1967).), and we feel that neither equity nor promotion of effective regulation requires such grant here. Although it is true in a sense that the States Marine Group has been deprived of the use of its funds by virtue of its overpayment, the fact that such overpayment was made, much less the amount of such overpayment, could not have been ascertained prior to our second decision herein.[17] In fact, in our first decision in this proceeding we found that the Puerto Rican carriers should have been assessed on an excepted basis (See 14 F.M.C. 94, 97–99, 103), which would have required adjustments in their favor as opposed to that of the States Marine Group.

Insofar as the period from the date of our remand is concerned, although various delays in this proceeding have occurred, the postponements were granted by Judge Morgan or by us because good cause was found for them. We also note in this regard that the States Marine Group itself has obtained several delays in the proceeding. We find nothing showing "delaying tactics" by anyone in obtaining such delays.

The contention that NYSA has "held" the funds which the States Marine Group claims is incorrect. NYSA promptly pays over any monies it collects to fund the benefits under its collective bargaining agreement with the ILA.

Although NYSA cannot be absolved from its liability to the States Marine Group for overassessment for the 1969–1971 period, it does not appear equitable or necessary or helpful for regulatory purposes to impose liability for interest upon it where NYSA has not engaged in any conduct which it should have known was improper at the time, has not been shown to have improperly delayed this proceeding, and did not hold but promptly paid over the assessments it collected for the use and benefit of ILA which was their intended and proper purpose.[18]

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[16] Although, in view of our denial of any interest on the States Marine Group's claim, it is unnecessary for us to determine what a proper rate of interest would have been, we do note in passing that the two percent figure suggested by the Group may not have much relevance to the problem since there appears to have been no late payment for which NYSA has exacted a two percent penalty.

[17] Cf. our denial of interest on unliquidated claims in *Philip R. Consolo v. Flota Mercante Grancolombia*, 6 F.M.C. 262, 269 (1961), reversed on other grounds *sub nom. Flota Mercante Grancolombiana v. FMC*, 342 F.2d 924 (D.C. Cir. 1964), and ultimately affirmed *sub nom. Consolo v. FMC*, 383 U.S. 607 (1966).

[18] The claim of the States Marine Group for refund, unlike its claim for interest, does not rest upon a discretionary basis. It rests upon the requirement of compliance with our order approving Agreement T–2390 upon the condition that such adjustments would be made as the ultimate decision showed to be necessary, our order in 15 F.M.C. (at 282, 287), ordering adjustments, our order of remand to Judge Morgan directing "implementation of the terms and

VI. The Manner in Which the Claim of the States Marine Group is to be Satisfied

There remains as an issue in this proceeding the manner in which the necessary adjustments to satisfy the claim of the States Marine Group will be made. As we observed in our order conditionally approving the settlement with the Puerto Rican carriers and in our order remanding this proceeding to Judge Morgan, the manner and method to accomplish the necessary assessment adjustments is one which is to be "adopted by NYSA." We, moreover, have not as yet determined that any of the members of the States Marine Group is necessarily entitled to a cash refund. (See Order of Remand, pages 5–6.) We expect NYSA to carry out its responsibility under our orders and establish a proper means for meeting its liability. While, as we have stated above, we attach no culpability to anyone for the delays which have occurred in this proceeding, we do note that over four years have elapsed since our order requiring that assessment adjustments be made and over two and a half years since the Court of Appeals for the District of Columbia Circuit affirmed the decision incorporated in that order. We now expect that, the amount of recovery having been determined here, the method of satisfying the States Marine Group's claim can be established with some dispatch. We would further expect NYSA and the States Marine Group, who deal with assessments on a regular basis and who best understand the mechanics involved in adjustments, to be able to resolve this matter in the most appropriate manner. To facilitate the resolution of this matter

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conditions of the approval of Agreement No. T–2390," and our order approving the settlement with the Puerto Rican carriers upon the condition that the rights of the States Marine Group were preserved. Our duty under section 15 to insure that agreements are carried out only as approved, as well as our obligations to insure that agreements we approve do not operate in a discriminatory manner, require that the adjustments we have ordered be made. Failure to make the adjustments here required would constitute the carrying out of an unapproved agreement because it would result in the imposition of an assessment burden on the States Marine Group different from that which flows from the modified assessment allocation formula which we have approved for Agreement No. T–2390. Furthermore, as we noted in our order of conditional approval of the settlement agreement with the Puerto Rican carriers, an approval of that agreement which did not adequately protect the rights of the States Marine Group "would operate in an unjustly discriminatory manner."

Even if the claim for refunds to the States Marine Group could be analogized to an action for reparation by a private complainant, which unlike the directive embodied in Commission orders, may permit of discretion and equitable Shipping Act policy considerations (See *Consolo v. FMC*, 383 U.S. 607, 621–622 (1966)), it is clear that both equity and policy considerations would require that the claim of the States Marine Group be granted. In conditionally approving Agreement No. T–2390, the Commission was resolving a dilemma in the only feasible manner. The public interest required that *some* assessment formula be approved in order that the payments be made to longshoremen which NYSA was obligated to make. See Order of Conditional Approval, March 11, 1970, pages 7–8. (For the important public interest in agreements of this type see also *Volkswagenwerk v. F.M.C.*, 390 U.S. 261, 263–264; *New York Shipping Association v. F.M.C.*, 495 F.2d 1215 (2nd Cir. 1974), *cert. denied*, 419 U.S. 964 (1974).) However, the agreement conditionally approved by the Commission had not been subjected to hearing, and in fact after hearing was found unlawful in part and ordered modified. See 15 F.M.C. 282, 287. In order both to serve the public interest by allowing collection of the longshoremen's benefits to be made and to protect all interests challenging the reasonableness of the assessment formula, the Commission had no alternative but to approve T–2390 on the condition that the necessary adjustments be made. For the Commission now to deny the States Marine Group's claim would be tantamount to declaring that its conditional approval was improper since such approval, absent hearing, can only be justified on the theory that effective adjustments would be made to cure any problems arising from assessments which are shown, after hearing, to be unlawful. The Commission, however, because of the paramount public interest in seeing that longshoremen's benefit payments are made and shipping is not disrupted, has no alternative but to grant a conditional approval prior to hearing. Thus a refusal by the Commission to grant the Group's claim would place the Commission in the untenable position of acknowledging on the one hand that it has to give conditional approval to assessment agreements and on the other that it cannot effectively do so.

we now set forth guidelines for the parties' consideration with respect to the manner and method of the adjustments which we here require.

Of course, cash refunds would be a proper means of making the necessary adjustments due the States Marine Group. Such cash refunds were made by NYSA to certain stevedores for overpayment of assessments at the end of 1968.

We further find no fault in principle with a system of "credits" against present or future assessments in lieu of direct payments as a means of reimbursement. We have, in fact, recognized that amounts due because of past expenditures may be repaid by means of credits rather than direct cash payments. See *Philippine Merchants Steamship Co., Inc. v. Cargill, Inc.*, 9 F.M.C. 153, 163 (1965). The "credit" method, moreover, may be a particularly appropriate one where, as here, we deal with continuing obligations under several successive agreements, the smooth operation of which is critical in the area of labor relations.[19] Credits, as noted above, have been given the automobile interests against overassessments for the 1969–1971 period as a basis for the settlement with those interests.

One other method might be to give the members of the Group "partial credits." Rather than not imposing any assessments against the States Marine Group until assessments due for future cargo movements equalled the $689,599 liability, NYSA might assess the members of the Group at a lower rate. The effect of this would be that the "repayment" would take more time, but since it would nevertheless be certain, such an approach could be acceptable if the time for repayment were reasonable.

Of course, although we here find that no settlement or waiver has occurred with respect to the Group's claim, the States Marine Group could, if it desired, agree to such settlement or waiver for valid consideration.

Our singling out of these methods of satisfaction of the States Marine Group's claim is not intended to exclude other methods as permissible approaches to satisfaction. Certain approaches, of course, are not acceptable. As we have made clear above, we cannot accept any lack of adjustments based upon the theory that adjustments have, because of the assessments in later assessment periods, already taken place.

Similarly, we cannot accept NYSA's position that three carriers of the States Marine Group, States Marine International, Inc., Isthmian Lines, and Meyer Line, which no longer serve the port of New York, are not in any case entitled to assessment adjustments. No carrier has ever been charged or penalized by NYSA in the past for leaving the port. Moreover, we are unable to see that the departure of the carriers has, as NYSA asserts, left assessment obligations behind. Uncontested evidence of record shows that each of these three lines paid all assessments due during the entire period it served New York. Assessment obligations in

[19] The States Marine Group itself suggests that its members "presently serving New York might be compensated by direct credits against present assessments. . . ."

the future will be met, as they should be, by those who actually employ longshore labor, directly or indirectly. By requiring adjustments for the three named carriers we do not, as NYSA contends, reward them for leaving the port. We merely require that the liability owed them be met. Since the three carriers no longer serve the port of New York, however, and thus no longer pay assessments, a system of credits or partial credits against present or future assessments is not a feasible means to satisfy their claim, and some other means of satisfaction must be adopted.

Although, of course, the burden which might fall upon NYSA as a result of its obligation to make adjustments cannot defeat that obligation, we do wish to point out that it is by no means clear that the burden is either of the type or magnitude which NYSA alleges. It is entirely possible, for example, that the satisfaction of the States Marine Group's claim may require no adjustment whatsoever in the level of assessments payable by those who pay fringe benefit assessments now and in the future. We note, for example, that a "surplus" existed both at the beginning and at the end of the period covered by T–2390. If this is also true at the end of the present period, no increases in the assessment level will be necessary and no disruption or modification of the assessment funding will be necessary or occur by reason of the Group's claim.

Furthermore, it is not certain that the liability of NYSA as a result of our decision herein will be $5,000,000, as it contends. It is true that the total overassessment against which refunds could be made for the 1969–1971 period is $4,839,293 ($5,004,344 Puerto Rican carrier underassessment less $165,051 automobile overassessment - see page 9, *supra*.). This does not, however, mean that NYSA will therefore be required to refund this amount. Since only the States Marine Group, of all the potential recipients of refunds, has participated in this phase of the proceeding and pressed its claim here, it would be inappropriate to attempt to make any determinations with respect to the rights of others to refunds. We would make only three observations in this regard. First of all, the necessary adjustments to satisfy the claims of the States Marine Group will in no way affect the possible rights to refunds of any other claimants. The dollar amount of the refund due the States Marine Group has been calculated in such a way that it is limited solely to that part of the refund to which the States Marine Group is entitled. Thus, the possibility of refunds to other claimants is irrelevant to the Group's claim, and no reason appears why such claim should not be discharged now. Secondly, other claimants may not be in the same position with respect to refund claims as the States Marine Group, having settled, waived, or agreed not to pursue such claims.[20] Finally, even if the entire $4,839,293 overassess-

[20] We note in this regard, without of course in any way deciding the merits of overcharge claims by claimants other than the States Marine Group, that the States Marine Group appears to be the only claimant which has actively pursued its claims, the order of approval of the Puerto Rican settlement refers specifically only to the claims of the States Marine Group, and that some potential claimants which may have been entitled to refunds replied to an informal poll conducted by a representative of the States Marine Group that they did not wish such refunds.

ment were repaid, it would amount to only about 1.55 percent of the $312 million benefit fund which is the subject of the present assessment period, and thus would not appear to create a significant financial problem when viewed in its proper context.

Accordingly, we will hold this proceeding open, and direct that within 60 days from the date of service of this Report and Order[21] NYSA (1) satisfy the States Marine Group's claim and notify us in writing of the method of satisfaction thereof, or (2) establish, with the concurrence of the States Marine Group,[22] the manner and method by which satisfaction of such claim is to be made, and furnish us with a written description thereof.[23]

Additionally, within this 60-day period, we will receive filings of claims on behalf of persons other than the members of the States Marine Group for assessment adjustments. Such claims must be supported by computations establishing the amount of the alleged overassessment in the manner adopted herein to compute the overassessment of the States Marine Group, i.e., $4,839,293 multiplied by the percentage the claimant's assessment bears to total assessments for the October 1, 1969–September 30, 1971 period. (See pages 8–9, *supra*.) In light of the problems present here with respect to the existence of possible settlements, agreements not to pursue, or waivers of claims (see pages 25–26, *supra*), such claims should also be supported by evidence that they are still extant. Copies of such claims should be served on counsel for NYSA. Finally, to insure that all possible claimants will be fully advised, we will publish in the *Federal Register* a notice of our action herein.

For the foregoing reasons, we find that refund adjustments are due the States Marine Group for the October 1, 1969–September 30, 1971 assessment period in the amount of $689,599. An order will be issued directing that within 60 days of date of service, NYSA (1) make such adjustments and notify us in writing of the method used for the adjustments, or (2) establish, with the concurrence of the States Marine Group, the manner and method of such adjustments and furnish us with a written description thereof. Claims by other persons for assessment adjustments relating to this period, duly supported, with copies to counsel for NYSA, may also be filed during that time.

Vice Chairman Clarence Morse and Commissioner Ashton C. Barrett concurring and dissenting.

We dissent from the majority report because we do not consider there to be any amounts owing from NYSA to the States Marine Group except

[21] Sixty days appears to be sufficient for such action in light of the parties' long familiarity with the subject matter of assessments and the fact that only the manner and method of satisfaction of the claim and not the amount of the claim itself is to be resolved.

[22] We, of course, expect that the States Marine Group will not withhold such concurrence for any manner and method of satisfaction which is within the spirit of this Report and Order.

[23] We, of course, cannot accept adjustment methods which we here find to be improper and remind both NYSA and the Group that a satisfaction or method of satisfaction risks rejection if it is not in good faith compliance with this report and order. See *American Export-Isbrandtsen L. Inc. v. F.M.C.*, 444 F.2d 824, 827–829 (D.C. Cir. 1970).

perhaps to the three carriers which discontinued service to the port in 1972.

Our disagreement is not as to whether the States Marine Group was overassessed in the 1969–1971 period. We agree that it was overassessed as the majority found in the Commission's prior decision.[24] We find from the evidence, however, that the overassessment of the States Marine Group (not including the three carriers) has since been recompensed and no further adjustment is required.

One of the critical elements of this matter is the Puerto Rican settlement.[25] There is no question that the settlement, itself, and the Commission's approval of it did not extinguish the States Marine Group's rights, if any, which were then unsatisfied. Similarly, those same actions did not create any new rights or revive any rights previously satisfied. What the settlement and order of approval did accomplish in this respect was to settle certain claims and permit the States Marine Group to have the opportunity to litigate its claims under any rights it believed remained to it after our approval of the settlement. Our Order of "Approval with Condition" said:

> We believe our action here . . . is fully consistent with the preservation of all "*rights*" *or* "*claims*" which States, *et al.*, have acquired by virtue of our decision in Docket 69–57. [Emphasis added.] [26]

By stating the alternative words "rights" and "claims" the order merely ensured that the States Marine Group could still make a claim as to any rights which the Group acquired in Docket No. 69–57, but the language does not say that the Group had any unsatisfied rights.

As the order further said:

> The manner of "assessment adjustment" necessary to satisfy the *claims* of States, *et al.*, as well as the amounts to be paid, are the subject of the implementation phase of our Docket No. 69–57 and will be decided therein. [Emphasis added.] [27]

This language can be fairly read to mean only that any unsatisfied rights previously accrued by the States Marine Group could still be pursued as to the amount of any adjustment and the manner of satisfying it.

Nowhere is it said that the rights preserved included the "right" to prevail as to any claim.

Thus, with respect to the effect of the Puerto Rican settlement, it is not enough to say, as does the majority, that by the Puerto Rican settlement, NYSA gave up "any and all claims to any recoveries which may be due in Docket No. 69–57"[28] [the 1969–1971 period]. There was a *quid pro quo* for that release. The Puerto Rican carriers "waive[d] any and all

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[24] *Agreement No. T–2336—New York Shipping Association*, 15 F.M.C. 259 (1972). But see concurring and dissenting opinion of Commissioner Morse, 15 F.M.C. 259 at 283.

[25] Agreement No. T–3017, approved January 16, 1975.

[26] Agreement No. T–3017, Approval with Condition, January 16, 1975, pp. 4–5.

[27] *Id.*, p. 6.

[28] Agreement No. T–3017, par. 2.

rights to any recovery from NYSA . . . pursuant to the issues involved in . . . Docket [No. 73–34]",[29] i.e., the 1971–1974 period.

The majority gives little weight to those claims asserted and then waived by the Puerto Rican carriers: "Considerations underlying settlements do not necessarily coincide with the process of making findings on a record in a litigated proceeding." That is true, but the parties to the settlement agreed to something. And that something, according to our order, was the "settlement of the rights and obligations between and among" the parties.[30]

Is the majority now saying that there really were no mutual obligations subject to the settlement—that it was a mere facade—and that because there existed real obligations on only one party, i.e., NYSA, there was no agreement and nothing to approve? Yet we said in our order approving the agreement that the settlement "does not appear to be improper".[31]

There was a legitimate understanding among the parties to the Puerto Rican settlement: while NYSA had real claims for the 1969–1971 period, the Puerto Rican carriers had real (albeit unlitigated) claims for the 1971–1974 period. In addition, there were other claims against NYSA by carriers which were overcharged in 1969–1971 because of and aside from the underpayment by the Puerto Rican carriers during that period. Thus NYSA had the prospect of paying claims of carriers for 1969–1971 and 1971–1974. For 1969–1971, it was non-Puerto Rican carriers, and for 1971–1974 it was the Puerto Rican carriers. However, there was also the collectible debt due to NYSA from the Puerto Rican carriers.[32]

What then was to be done? NYSA could have insisted upon payment to it by the Puerto Rican carriers of $5 million which it would probably have had to distribute to all carriers overassessed in 1969–1971. Then NYSA would have had to pay a substantial sum (estimated at $7.4 million) to the Puerto Rican carriers; but to do so NYSA would have had to collect that amount from all non-Puerto Rican carriers underassessed in 1971–1974. As a further complication there were specific payments due from NYSA to certain carrier groups, i.e., the automobile and newsprint carriers, and also claims arising out of periods after 1969–1971.

To avoid the making of payments back and forth and to avoid further litigation, NYSA, on behalf of its membership,[33] including the States Marine Group, negotiated settlements with the specific carrier groups found in Docket No. 69–57 to have been improperly assessed. Such agreements were reached with the automobile, newsprint, and Puerto

[29] *Id.*, par. 3.
[30] Approval with Condition, p. 4.
[31] In fact, the record shows the value of NYSA claims to be about $5 million and of the Puerto Rican carriers' claims, about $7.4 million. See 15 F.M.C. 259, 275 and Exh. 157, p. 3.
[32] Approval with Condition, p. 4.
[33] NYSA By-Laws, Article IV, section 3; Exh. 160, p. 11:

Duties of Directors. The Board shall have the power . . . to employ counsel, and to direct any of the employees of the Association . . . to devise and carry into execution such other measures as they may deem proper and expedient to promote the objects of the Association and to protect the interests and welfare of the membership.

Rican carriers and included several types of settlement: credits, setoffs, and waivers of claims.

The improper assessment of the States Marine Group was not dealt with by NYSA in the same fashion because the States Marine Group was on the same side of the "settlement table". It was among the members of NYSA for whom NYSA was negotiating the settlements with the automobile, newsprint, and Puerto Rican carriers. Thus, the three settlements resolved the improper assessment problems for all concerned: those carriers whose overassessments were specifically "repaid" or underassessments specifically "collected", and the rest of the NYSA membership.

No one objected to those settlements. Neither the States Marine Group nor any other carriers objected to the necessary payments, credits, or setoffs. Most importantly, no objections were made to the fact that although the automobile and newsprint carriers' claims arose originally out of the 1969–1971 period, NYSA agreed to make "payment", in part, through reduced assessments in later periods.[34] Furthermore, the Commission approved those settlements.[35]

It is contended by the majority that "merging" more than one contract period is wrong for purposes of effecting a settlement with the States Marine Group. Yet, as noted above, that very approach was approved by the Commission when it approved the automobile and newsprint carriers' settlement agreements with NYSA. There is, therefore, precedent for the use of future reduced assessments for the settlement of claims arising out of this proceeding.

Furthermore, the relationship between NYSA and ILA is more truly a continuing, ongoing, long-term relationship than it is a series of finite, short-term, unrelated agreements—the relationship is long-term; only the details of the relationship vary from contract period to contract period. Rather than becoming involved in unneeded and expensive litigation, it is in the public interest in these ongoing relationships of labor and management that the interested parties themselves adopt adjustment procedures which have the objective of leveling out the occasional contractual inequities.

The States Marine Group, however, objects vigorously to that type of settlement as applied to it as being improper. The Group contends that this proceeding, and the 1969–1971 period for which it has been litigated, must stand on its own, completely separate from all consideration of future periods. Obviously other carriers who possessed rights and claims arising out of the 1969–1971 period did not share that view when they agreed to exchange their rights and claims for future benefits; and neither did the Commission object to that approach in approving those arrangements.

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[34] Agreement No. T-3023, par. 4; Agreement No. T-3055, par. 6.

[35] Approval of Agreement No. T-3023, December 13, 1974, and Approval of Agreement No. T-3055, February 21, 1975.

It cannot, therefore, be found that the Commission may not accept satisfaction of the States Marine Group's claims on the same basis. It might be contended, however, that although the Commission may approve such a settlement of the States Marine Group's claims on that basis, the States Marine Group has not agreed to it. Nevertheless, the purpose of this phase of Docket No. 69-57 is to finally resolve all claims arising out of our prior decision herein; and the Commission has the authority to find, and we do find, that although no agreement, as such, has been reached between NYSA and the States Marine Group, nevertheless, adequate recompense has in fact been made except, perhaps, as to the three carriers which discontinued service to the port in 1972.

The majority leaves it to the parties to agree on a settlement within 60 days. Despite our approval of the other settlements based upon reduced future assessments, the majority would apparently not accept an agreed settlement on the same basis. We find, however, that satisfaction of the States Marine Group's claims (except as noted) has been made in that fashion and there is no point in prolinging the litigation. If the parties do not agree on a settlement within the 60 days, the majority will be faced with the problem of imposing a settlement, although we find one is in existence now.

We consequently conclude that the reduced future assessments accorded the States Marine Group adequately settled the States Marine Group's claims, but even if they did not do so in whole or in part, the claims have been resolved entirely by virtue of the setoff aspect of the Puerto Rican settlement.

The Puerto Rican settlement was, basically, a setoff of claims. NYSA could have insisted that the Puerto Rican carriers pay the $5 million; but those carriers would then have pursued their claims against NYSA for the $7.4 million. Instead the two parties mutually relinquished their claims. The obvious benefit to the States Marine Group and other carriers was avoidance of the need to pay the difference to the Puerto Rican carriers.

The argument is made by the States Marine Group and adopted by the majority that such a conclusion is based on speculation. They contend that the level of the NYSA debt to the Puerto Rican carriers is unknown if it existed at all, having not been litigated.

As we discussed above, however, the Commission having approved the Puerto Rican settlement as not being improper, we may not now say that no claims of the Puerto Rican carriers against NYSA existed. Furthermore, the States Marine Group did not oppose the settlement except to reserve its rights. In other words, the States Marine Group acquiesced in the Puerto Rican carriers' assertion of $7.4 million in claims and in NYSA's agreement to set them off against the $5 million NYSA claim against the Puerto Rican carriers. In fact the States Marine Group

asserted "their position that, inasmuch as they have no direct interest in the settlement, they neither object to nor oppose its approval.[36]

That the States Marine Group felt it had "no direct interest" in the Puerto Rican settlement cannot prevent us from finding that the settlement did in fact resolve its claims as part of the over-all interests of NYSA. Counsel for the States Marine Group said at Oral Argument in this proceeding:

> The entire case against us is that settlement which is used to offset our claims . . . and, frankly, had we known that the arguments . . . were going to be made today, I think we would have taken a different position on that Puerto Rican settlement.[37]

Having, therefore, not objected to the settlement and its contents, the States Marine Group was bound because of its membership status within the NYSA structure.[38]

Thus, regardless whether or not the Puerto Rican carriers' claims against NYSA were litigated as to validity or amount, all parties in interest accepted those claims as fact, and we approved them.

The majority says, however, that the NYSA case is based on speculation, and is therefore untenable. The same can be said for the majority's view. The majority starts with the contention that the States Marine Group was overassessed in the periods after 1969–1971. It is then said that even if the Puerto Rican carriers were overassessed in 1971–1974, the States Marine Group may also have been overassessed in that period, thereby negating the benefits to the latter of the Puerto Rican settlement. Yet the majority says: "We do not say that this is necessarily the case . . . [but] stress that such possibility . . . hardly supports NYSA's contention that assessments on the States Marine Group during the later periods 'compensated' it for any overassessments which may have been made in the 1969–1971 period." [*supra*, p. 15].

If the claims of the Puerto Rican carriers for 1971–1974 are speculative, as the majority contends, the possible overassessment of the States Marine Group in the same period is even a worse sort of conjecture. It is based merely on the "implication" of some evidence.

The majority says further:

> Since it cannot be shown that the Puerto Rican carriers were overassessed for the 1971–1974 period, it follows, *ipso facto*, that the States Marine Group cannot be shown to have been underassessed by virtue of such overassessment. [*supra*, p. 14].

The evidence is certainly no less persuasive as to the converse: since it cannot be shown that NYSA and the Puerto Rican carriers entered into a meaningless settlement based on a nonexistent overassessment of the Puerto Rican carriers, it cannot be shown that the States Marine Group (not including the three carriers) was not recompensed by that settlement.

The majority argues that the reduced assessment for future contract periods is not a proper setoff for the States Marine Group's claims

[36] Agreement No. T-3017, Approval with Condition, p. 4.
[37] Transcript of Oral Argument, Docket No. 69-57, July 1, 1976, p. 68.
[38] See Footnote [35], *supra*.

because the Group was entitled to the lower assessment. This is based on the assumption that the Commission-approved assessment formula for 1969–1971 would not have been approved for later periods. This assumes that the parties to the later assessment agreements would have ultimately submitted the same formula (which they did not) and this is surely no less speculative than NYSA's contentions. Furthermore, if the majority is correct now, the Commission should not have approved the automobile and newsprint carriers' settlements which gave future reduced assessments to which those carriers were arguably entitled. What is permissible for one group of carriers ought to be equally so for all. The evidence in this case does not reveal any grounds for different treatment.

With respect to the three carriers which discontinued serving the port in 1972, we find them not to have been compensated by NYSA. Their claims were not covered by either the reduced future assessments or the setoff aspect of the Puerto Rican settlement, being events subsequent to the three carriers' departure from the trade. Also, we concur in the majority's conclusions with respect to NYSA's contentions as to the three carriers having left debts behind. We therefore concur in the requirement imposed by the majority that, as to the three carriers which discontinued serving the port in 1972, a method of satisfaction, exclusive of interest, be adopted within 60 days.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 69-57

AGREEMENT NO. T-2336—NEW YORK SHIPPING ASSOCIATION COOPERATIVE WORKING ARRANGEMENT

NOS. 71-2, 71-8, 71-26, AND 71-34

TRANSAMERICAN TRAILER TRANSPORT, INC., SEATRAIN LINES, INC., DANIELS &KENNEDY, INC., CHANDRIS AMERICA LINES, INC., GREEK LINE, INC., HOME LINE AGENCY, INC., INCRES LINE

v.

THE NEW YORK SHIPPING ASSOCIATION, INC.

ORDER

The Federal Maritime Commission, having this date made and entered of record a Report in the above matter, which Report is hereby referred to and made a part hereof;

THEREFORE, IT IS ORDERED, That the New York Shipping Association, Inc. (NYSA) is found and declared to be liable to the following carriers for claims in the following amounts, constituting overpayments made by such carriers with respect to the October 1, 1969—September 30, 1971 period of assessments for longshoremen's benefits:

Norwegian America Line	$ 14,518
Atlantrafik	10,646
Nedlloyd & Hoegh Lines	17,905
Hellenic Lines Ltd.	29,520
Concordia Line	62,911
Blue Sea Line	8,711
Barber Steamship Lines, Inc.	94,850
States Marine International, Inc. and Isthmian Lines	103,077
Meyer Line	114,207
Prudential Lines, Inc.	233,254;

IT IS FURTHER ORDERED, That NYSA shall, within 60 days of

date of service of this order, (1)satisfy the above enumerated claims and notify the Commission in writing of the method of satisfaction employed, or (2) establish, with the concurrence of the above named carriers, a manner and method of satisfaction of the claims of said carriers and furnish the Commission with a written description thereof; and

IT IS FURTHER ORDERED, That within 60 days of date of service of this order the Commission will receive filings of claims on behalf of persons other than those above named for assessment adjustments for the October 1, 1969—September 30, 1971 period. Such claims must be supported by computations establishing the amount of the alleged overassessment (i.e., $4,839,293 divided by the percentage the claimant's assessment bears to total assessments for the October 1, 1969—September 30, 1971 period) and evidence that claimants have not settled, agreed not to pursue, or waived such claims. Copies of such claims shall be served on counsel for NYSA; and

IT IS FURTHER ORDERED, That a notice of our action in this proceeding shall be published in the *Federal Register*.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 69–57

AGREEMENT NO. T–2336—NEW YORK SHIPPING ASSOCIATION
COOPERATIVE WORKING ARRANGEMENT

NOS. 71–2, 71–8, 71–26, AND 71–34

TRANSAMERICAN TRAILER TRANSPORT, INC.
SEATRAIN LINES, INC.
DANIELS & KENNEDY, INC.
CHANDRISAMERICA LINES, INC.
GREEK LINE, INC.
HOME LINE AGENCY, INC.
INCRES LINE

v.

THE NEW YORK SHIPPING ASSOCIATION, INC.

Claim of States Marine group, consisting of 12 so-called break-bulk lines, that these lines were overassessed in 1969–1971 for fringe benefits for longshoremen in the Port of New York, in the sum of about $4,000,000, including an alleged share of a surplus of funds of the New York Shipping Association, and including interest at 2 percent per month, found unjustified and completely without merit; said claim insofar as made against three Puerto Rico carriers, namely Sea-Land, Seatrain and TTT, found barred by the two-year statute of limitations.

C. P. Lambos and *Donato Caruso* for respondents, the New York Shipping Association and its members.

Stanley O. Sher and *Jacob P. Billig* for interveners, States Marine International, Inc., Isthmian Lines, Prudential Lines, Inc., Atlanttrafik, Barber Lines, Blue Sea Line, Concordia Line, Hellenic Lines, Hoegh Lines, Meyer Line, Nedlloyd Line and Norwegian American Line.

Ronald A. Capone and *Stuart S. Dye* for intervener and complainant, Transamerican Trailer Transport, Inc.

Neal M. Mayer for intervener and complainant Seatrain Lines, Inc.

Gerald A. Malia for intervener, Sea-Land Service, Inc.

Alan F. Wohlstetter for intervener, Wallenius Line.

Cecelia H. Goetz and *Alan D'Ambrosio* for intervener, Wolfsburger Transport-Gesellschaft m.b.H.

Joseph F. Kelly, Jr., for complainant, Daniels & Kennedy, Inc., and for intervener, the Madden Corporation.

Samuel H. Moerman for intervener, the Port Authority of New York and New Jersey.

Mario Escudero for intervener, the Commonwealth of Puerto Rico.

Donald J. Brunner and *Paul J. Kaller* as Hearing Counsel.

SUPPLEMENTAL INITIAL DECISION OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE[1]

In the subject proceedings many of the matters in issue for a long time, either have been litigated to final conclusion, or have been settled by certain settlement agreements,[2] reached voluntarily by the parties, and approved by the Federal Maritime Commission (FMC or Commission). These approved agreements pertain to the automobile interests, the newsprint interests, and to the Puerto Rican ocean common carriers. The last of these agreements concerning the Puerto Rican carriers was approved on April 22, 1975.

There remains presently in issue the claim for about $4,000,000 made by 12 so-called break-bulk lines, the States Marine group, based upon this group's allegation that these 12 lines or their predecessors were overassessed by the New York Shipping Association, Inc. (NYSA), in a 1969–1971 period for fringe benefits for longshoremen in the Port of New York. NYSA made the assessments to raise monies required by the collective bargaining agreement between NYSA and the International Longshoremen's Association, AFL-CIO (ILA).

Besides the settlement agreements, there have been two prior FMC decisions, and a Court of Appeals decision which affirmed the second FMC decision. The first FMC decision is *Agreement No. T-2336*, 14 F.M.C. 94 (1970). The second FMC decision is *Agreement No. T-2336—New York Shipping Assoc.*, 15 F.M.C. 259 (1972). The Court decision is *Transamerican Trailer Transp., Inc. v. Federal Mar. Com'n.*, 492 F. 2d 617 (D.C. Circuit 1974). These decisions will be referred to as the first decision, the second decision, and the Court decision. The second decision made findings which in the view of the States Marine group support the present claim.

In both its first and its second decision the Commission dealt with agreement no. T-2804, which was NYSA's so-called permanent man-hour/tonnage assessment agreement for the two year period from October 1, 1969 through September 30, 1971. Generally where reference herein is made to assessment periods or labor contract periods by years only, such

[1] This decision will become the decision of the Commission in the absence of exceptions thereto or review thereof by the Commission. Rule 13(g), Rules of Practice and Procedure, 46 CFR 502.227.

[2] Approval of Agreement No. T-3007-1, December 13, 1974, Approval of Agreement No. T-3023, December 13, 1974, both relative to the automobile interests; Approval of Agreement No. T-3007-2, February 21, 1975, Approval of Agreement No. T-3055, February 21, 1975, both relative to the newsprint interests; and Approval With Condition of Agreement No. T-3017, January 16, 1975, Approval of Agreement No. T-3017-3, April 22, 1975, both relative to the three Puerto Rican carriers, Sea-Land, Seatrain and TTT.

as 1969–1971, this is meant to cover the periods beginning October 1, and ending September 30.

In both decisions the Commission approved agreement no. T–2804 subject to certain modifications. There were differences in the two decisions as to the modifications approved by the Commission, mainly with regard to the rate of assessment for the three carriers then in the Puerto Rican trade, namely Transamerican Trailer Transport, Inc. (TTT), Seatrain Lines, Inc. (Seatrain), and Sea-Land Service, Inc. (Sea-Land). Other modifications in the first decision related to bananas, Alaskan cargoes and Hawaiian cargoes, and in the second decision to automobiles and to newsprint.

The present claim is largely, if not entirely, related to the findings regarding the Puerto Rican carriers in the second decision, and to the approval with condition of the Puerto Rican settlement agreement. But, for background purposes and for a complete understanding of the present issues, many other facts of record are pertinent.

Agreement no. T–2804 provides the so-called man-hour/tonnage combination assessment basis for all regular cargoes not otherwise specially provided for in this agreement. Agreement no. T–2804 also provides the so-called "excepted cargo" treatment for listed cargoes such as, domestic intracoastal and intercoastal, lumber at lumber terminals, bulk cargo (including scrap and sugar), and passengers and their personal baggage. Excepted cargoes generally are considered to be marginal cargoes, which might otherwise be lost to the Port of New York if they were to be assessed on some other basis, such as the combination basis of man hours and tons. Excepted cargo pays on a man-hour basis subject to any applicable royalty, exhibit no. 9, and *first decision*, 14 F.M.C. 94, 114. The "excepted cargo" assessment rate included a flexible amount for the fringe benefit expense of guaranteed annual income (GAI), because GAI fluctuated from quarter to quarter depending upon the numbers of longshoremen eligible for GAI *second decision*, 15 F.M.C. 259, 264, footnote 10, and 302.

The tonnage assessment factor under agreement no. T–2390 is a variable or plugged amount, *first decision*, 14 F.M.C. 94, 120. The tonnage assessment is calculated by first estimating total liabilities or total fringe benefit obligations, then subtracting therefrom the estimated sum of the monies to be obtained from "excepted cargo" assessments and from the man-hour portion of assessments on regular cargoes. From the net figure above, divided by estimated tons of regular cargo, is derived the per ton assessment for the regular cargoes assessed on the combination basis.

Besides "excepted cargo," other cargoes such as bananas and unboxed automobiles, trucks and buses, received special treatment by virtue of variations in the definitions of a ton of cargo.

When various cargoes were given "excepted cargo" treatment, special tonnage definition treatment, or partially excepted cargo treatment as was

the cargo of the Puerto Rican carriers in the *second decision*, 15 F.M.C. 259, 271, 272, it naturally followed that the remaining regular cargoes assessed on the man-hour/tonnage basis would tend to be assessed higher tonnage-factor rates, insofar as the excepted cargoes and partially excepted cargoes did not pay assessments equal to those paid by the regular cargoes on a ton of cargo.

Because NYSA never could precisely forecast tonnages prospectively moving in the Port of New York, the agreement T-2804 tonnage factor was an estimate always subject to change from time to time. Also, as seen the excepted cargo man-hour rate of assessment was subject to change because of the GAI factor.

When NYSA underassessed its members because of inaccurate tonnage estimates, at times NYSA had to borrow funds from banks to meet its fringe benefit obligations to the various ILA-NYSA trust funds. On the other hand, when NYSA overassessed its members, it could carry forward such monies to be used in the next quarter or next contract year. An overassessment in one period generally would be offset by a reduced or adjusted assessment in the next period. Such a procedure was fully in accord with the provisions of agreement no. T-2804 regarding "Tonnage Assessment," wherein the Board of Directors of NYSA was authorized to modify the tonnage assessment on the basis of experience.

From the above it follows that various carriers as they entered and left the trade of the Port of New York might temporarily gain or suffer from the changed tonnage assessments, which were necessarily imprecise, because of the vagaries of the economics of the times, and because of other factors affecting shipping tonnages, as well as because of the problems of forecasting precise fringe benefit expenses when these included the highly unpredictable expense of GAI. However from period to period all carriers' overassessments and underassessments would tend to even out, and compensate for the imprecise tonnage estimates. And it was the standard practice, and the only practicable method to operate, for NYSA to adjust or offset overassessments and underassessments by adjusting the assessment rates or net bills on future, but not on past, assessments.

As inflation increased from year to year, and various fringe benefit expenses for longshoremen increased from year to year, this had the general effect of placing many of the burdens of fringe benefits on carriers new to the trade of the Port of New York, and in effect of letting those carriers which ceased serving the trade escape many of their just fringe benefit burdens which they left behind, such as the fringe benefit burden of pensions.

As may be seen from the general discussion above, among other reasons, there is no way that the benefits derived by the carriers serving the trade of the Port of New York can be related precisely to their obligations to pay fringe benefit costs. There is simply no way to obtain a

perfect formula of assessment, *second decision,* 15 F.M.C. 259, 281, 282, and *first decision,* 14 F.M.C. 104, 147.

In the *second decision,* 15 F.M.C. 259, 275, as well as in the *first decision,* the FMC made no changes in the combination man-hour/tonnage assessment basis proposed by NYSA for carriers of general cargoes operating in the foreign trades, including containership carriers and break-bulk carriers, including among the latter the 12 lines of the States Marine group, except to the extent that these carriers may have handled a relatively few unboxed automobiles. Most autos were handled by carriers who specialized in carrying autos. In the *second decision,* the Commission said, It would perhaps be desirable if the entire formula could be reworked so that every interest could be carefully examined and assessments revised in an attempt to achieve a more equitable allocation, but such an exercise would lead to administrative complexities which would offset any slight improvement that could be achieved.

In other words the basis of assessment of the lines of the States Marine group was approved by the FMC in its two decisions. Also, this assessment basis for the States Marine group was affirmed by the Court decision.

How then can the States Marine group now assert any claim of overassessment? The Commission promised that necessary adjustments in assessments would be made, based on the findings of its second decision, but there were no findings in the second decision that the lines in the States Marine group were overassessed. The major issue covered in the second decision was the rate of assessment for the Puerto Rican carriers, and for the automobile and newsprint interests, *second decision,* 15 F.M.C. 259, 262.

Nevertheless, the States Marine group latches on to the findings in the second decision that the Puerto Rican carriers were underassessed to the extent that they were found not to have been assessed for their fair share of the fringe benefit cost of guaranteed annual income in 1969–1971. From this finding regarding the Puerto Rican carriers, the States Marine group leaps to the conclusion that concomitantly it was overassessed in 1969–1971. The States Marine group chooses to ignore its assessment treatment in 1971–1974 and 1974–1977.

If under the reasoning of the States Marine group those 12 lines were overassessed in 1969–1971, so also were the numerous other carriers operating in the foreign trades including the containership lines and the other break-bulk lines. In other words, not only would the States Marine group be entitled to assessment adjustments, but so also would all carriers which were assessed on the regular man-hours/tonnage basis. This would even necessitate 1969–1971 adjustments for Sea-Land and Seatrain, which also operated in the foreign trades (where they were assessed on the combination basis), in addition to their operations in the Puerto Rican domestic off-shore trade.

The States Marine group in effect now says to forget about the other

carriers in the foreign trades, because these other carriers have not been represented by their own counsel continuously, and have not pressed claims for adjustments of their assessments, as have the States Marine group, and as have the automobile and newsprint interests. The States Marine group conveniently forgets that the Commission made specific findings necessitating assessment adjustments regarding the automobile and newsprint interests.

Also, NYSA points out that adjustments for 1969–1971 on the basis sought by the States Marine group when projected for all of the carriers in the foreign trades would total about $28,000,000. If such a sum now had to be raised, the monies would have to come from carriers presently serving the trade of the Port of New York, and an increase in the present tonnage assessment would be required. Such an increase would do nothing to help preserve the Port's cargoes. In fact there likely would be cargo diversions to other ports, and the resulting increased assessments for fringe benefits would result in harm to the shipping industry and its labor relations at the Port of New York.

In the FMC's order, *second decision*, 15 F.M.C. 259, 287, NYSA was required to submit a report on the manner and method adopted by NYSA to accomplish the adjustments in the assessments made necessary by the terms and conditions of the second decision. NYSA submitted its proposed method of implementation, and the other parties were permitted to comment thereon.

Seatrain and Hearing Counsel then suggested that there be an informal meeting of all parties to develop mutually acceptable procedures with FMC staff supervision to meet the issues then posed. The Director, Bureau of Hearing Counsel, was designated by the Commission to select staff members.

Staff attempts to implement the FMC's second decision by voluntary agreement of the parties were unsuccessful. For one reason, the parties insisted that action could not be taken pending decision by the Court of Appeals. Also, dollar amounts and methodology of adjustments remained bitterly contested.

Accordingly, on April 6, 1973, the Commission ordered the proceedings remanded to the Office of Administrative Law Judges for further formal hearing for the limited purpose of implementing the manner and method adopted by NYSA to accomplish the adjustments in the assessments as made necessary by the terms and conditions of approval of agreement no. T-2390 contained in the FMC's second decision. The present initial decision is the decision in accordance with that order, except to the extent that subsequent to that order the parties voluntarily have reached certain settlement agreements approved by the FMC, which settlement agreements have disposed of most of the issues covered by the said order of remand for implementation. In fact, as ultimately concluded herein, the said settlement agreements have disposed of all issues covered by the

order of remand and implementation, inasmuch as it is found herein that the claim of the States Marine group is unjustified.

Before the voluntary settlements were reached a prehearing conference was held in May 1973, in Docket No. 69–57 and the related subject proceedings, and certain discovery procedures began. Audits by certified public accountants were deemed necessary with regard to documents of confidential nature. Each party wanted to perform its own audit or to have its own auditor check the tonnage records of other ocean carriers. A limited group of auditors was ordered to be agreed upon, and in time audits were made.

Whether as a result of the audits, or because the Court of Appeals made its decision in 1974, or because of the desire to avoid more protracted and expensive litigation, the parties reached their settlement agreements voluntarily.

Also, to a great extent the parties, including the ILA, reached the settlement agreements so as to avoid labor problems in connection with the 1974–1977 longshoremen's labor contract.

The hearing on remand for implementation was concluded on April 21, 1975, and the record includes the records of the two prior proceedings, with a total of 4649 pages of transcript and some 167 exhibits, among which are the recent settlement agreements.

The States Marine group never filed a formal complaint in these proceedings. While two of the Puerto Rican carriers had filed complaints and the three in time had protested agreement no. T–2390, the States Marine group never listed itself or its lines as protestants. In fact these 12 lines or their predecessors were designated as respondents in Docket No. 69–57 as members of NYSA. But, this group, knowing that its interests did not coincide with the interests of the members of NYSA, intervened and were represented by their own counsel. Generally the States Marine group supported the NYSA's contention that the combination assessment basis was proper for most all carriers including the States Marine group and the Puerto Rican carriers, although the States Marine group would have preferred a straight tonnage assessment basis for the 1969–1971 period.

Other members of NYSA, such as the Puerto Rican carriers, which vigorously protested agreement no. T–2390, also were represented by their own counsel. Non-members of NYSA, such as Wobtrans (a carrier of Volkswagen automobiles) and Wallenius (a carrier of other foreign cars westbound and of a few American cars eastbound), also intervened and opposed agreement no. T–2390. These automobile interests bore the expenses of the fringe benefit assessments through payments which they made to their stevedores, who were the direct employers of the longshoremen. The newsprint interests likewise intervened and opposed agreement no. T–2390. Many other interests also were represented by independent counsel from time to time in these proceedings, but they and their counsel withdrew, either after agreeing with NYSA on proper

assessment bases, or upon the belief that NYSA and its counsel properly represented the positions of these other interests.

From time to time counsel for NYSA, representing the majority views of NYSA, has been aligned on many issues with the views of the break-bulk carriers, and on other issues has been aligned with the views of other parties. As to the present claim of the States Marine group both NYSA and the Puerto Rican carriers oppose making additional adjustments or payments to the States Marine group. At all times the break-bulk carriers have been represented on the Board of Directors of NYSA. In fact, when the recent settlement agreement with the Puerto Rican carriers was approved by NYSA, it was without objection by any of the members of the Board of Directors including the so-called break-bulk representation on the Board of NYSA.

The ILA also participated in the so-called settlement agreements with the automobile interests, the newsprint interests, and the Puerto Rican carriers. The ILA had long supported the views of the break-bulk carriers that there should be a change from the old man-hours only method of assessment for fringe benefits. The ILA also supported arguments made in 1974 that changes were needed to correct inequities in the man-hour/tonnage assessment formula. It is the view of the ILA, through its president, that the said settlement agreements, along with the full tonnage assessment agreement approved by the ILA and NYSA for 1974–1977, would put an end to all assessment litigation, such as the present claim of the States Marine group. The president of the ILA stated that the ILA was ultimately convinced that the full tonnage assessment method of 1974–1977 was on a fair and equitable basis because it very substantially reduced the assessment cost to the break-bulk carriers. The ILA agreed with this assessment method on certain conditions, one important condition being that the litigation regarding fringe benefit assessments in the Port of New York, be settled.

Accordingly in 1974 discussions were had by the ILA with NYSA members of the Negotiating Committee, including members of NYSA's Board of Directors, including Mr. Dagfinn Gunnarshaug, who is also a director of Concordia Line, one of the States Marine group. Mr. Gunnarshaug was put on the Board of Directors of NYSA to represent the interests of the break-bulk lines and he was also a member of the NYSA–ILA Contract Board.

The ILA took the position that the assessment solution had to be a full, fair and final one and that only three adjustments were required as follows:

1. Newsprint had to be encouraged to stay in the Port by the settlement of its claims;
2. Automobile carriers, that had been seeking berths in other ports, should also be encouraged to stay in the Port of New York by adjustment of the tonnage definition of an unboxed automobile to a weight basis; and
3. The Puerto Rican carriers should continue to pay on a full tonnage basis but the NYSA claim for 1969–71 should be waived by NYSA and the Puerto Rican carriers' claim for 1971–74 should be waived for the Puerto Rican carriers.

The above three were the only assessment adjustments contemplated, and it was clear to all participants in the negotiations, that as a result of the negotiations the break-bulk carriers were fully satisfied and had been given more than ample consideration for waiving any and all claims which they may have alleged under the 1969–1971 period. In fact, the president of the ILA had specific and express discussions with respect to the claim of the break-bulk carriers, and he stated on a number of occasions that he was sure that the break-bulk carriers would not seek "icing on their cake," after having been given full consideration in the 1974 negotiations. The president of the ILA accordingly was greatly surprised when he learned of the position taken by the States Marine group in the present proceedings.

The president of the ILA points out also that States Marine International, Inc. (including Isthmian Lines) and Meyer Line reduced and phased out their operations in the labor contract year 1971–1972, and in contract year 1972–1973 they completely abandoned the Port of New York, and that they left behind tremendous liabilities of over a half of a billion dollars to the ILA's pension fund and other fringe benefit funds. The testimony of the ILA's president, exhibit 159 of record, is uncontroverted.

It is the position of the ILA that the ILA will continue to protect the interests of the break-bulk carriers as well as the interests of all contributors to job opportunities for the ILA's work force in the Port of New York, but that the break-bulk carriers including the States Marine group have no justifiable present claim.

The consist of the States Marine group varied from time to time. Originally it included only two lines (States Marine Lines, Inc., and Isthmian Lines, Inc.). At one time it included Marchessini Lines and Moller Steamship Co., but these two lines are no longer listed. The present 12 lines as listed on the brief of their counsel are States Marine International, Inc., Isthmian Lines, Prudential Lines, Inc., Atlanttrafik, Barber Lines, Blue Sea Line, Concordia Line, Hellenic Lines, Hoegh Lines, Meyer Line, Nedlloyd Line, and Norwegian America Line. Prudential Lines, Inc., apparently is the successor to Prudential-Grace Steamship Co., listed in the *second decision*, 15 F.M.C. 259, 262, footnote 3. Presumably, the States Marine group consists of only those break-bulk lines willing to bear the expenses of separate counsel, independent of counsel for NYSA, whose expenses they share through the fringe benefit expense of NYSA administration.

Specifically the States Marine group alleges four things. One, that collectively these 12 lines for 1969–1971 were overassessed $715,621. Two, that these 12 lines are entitled to a further collective sum of $1,315,600 as their allegedly proper share (14.3 percent) of an alleged surplus of about $9,200,000 in the fringe benefit funds as of September 30, 1971. Third, that on the total of the two above sums of about 2.031 million dollars, these lines are entitled to interest at 2 percent per month, which

amounts to at least 24 percent per year, if not compounded, with interest payable from September 30, 1971, until paid. Adding 96 percent for interest for 4 years, results in the total claim of about $4,000,000. Four, that these sums are due and payable to the States Marine group directly from Sea-Land, Seatrain, and TTT, the three Puerto Rican carriers which operated in the New York/Puerto Rican trade in the 1969–1971 period.

In its reply brief the States Marine group states that its claim is against both NYSA and the Puerto Rican carriers.

Item four above, the claim of direct liability of the Puerto Rican carriers, is made in spite of the fact that in the past no ocean carrier ever made any assessment payment to any other ocean carrier, and in fact all assessment payments were made by the direct employers of the longshoremen, that is, by the ocean carriers and stevedores, members of NYSA, to NYSA. In turn, NYSA turned over the monies raised from the assessments to the fringe benefit funds administered jointly by NYSA and by the ILA.

The States Marine group on brief states that an order by the Commission is acceptable to the States Marine group, if the order first requires the three Puerto Rican carriers to make sufficient payments to NYSA, and second requires NYSA to pass on these payments to the States Marine group, so as to fully recompense this group.

Technically, the claim of the States Marine group against the three Puerto Rican carriers is barred by the two-year statute of limitations. No complaint was filed against these carriers in accordance with section 22 of the Shipping Act, 1916 (the Act). Also there are meritorious reasons for denying such a claim if it had been filed properly.

The States Marine group denies that it is exercising anything in the nature of a vendetta against the Puerto Rican carriers.

The Puerto Rican carriers and the States Marine group have been at opposite poles regarding the assessments issues, simply because the Puerto Rican carriers have been innovative, using large containers, containerships and roll-on/roll-off (ro-ro) ships, whereas the States Marine group largely have used the relatively old-fashioned break-bulk ships but with such ships adapted to improved methods such as palletization of cargoes, and carrying some containers. Generally speaking, containers, containerships, and ro-ro ships require large capital investments in ships, containers, cranes and shoreside facilities, whereas break-bulk ships operate with much smaller capitalizations.

By using large containers and cranes located at shoreside facilities, the labor productivity of the containership lines is about 5 times as efficient as that of the break-bulk lines. A containership, with an estimated productivity of 2.54 tons of cargo per man hour of longshore labor may be loaded or unloaded about 5 times as fast as a conventional break-bulk ship with an estimated productivity of 0.52 tons of cargo per man hour. *First decision*, 14 F.M.C. 94, 119.

For many years prior to October 1, 1969, the ocean carriers in the Port

of New York were assessed for fringe benefits on the basis of man hours of longshore labor. This was the logical way to do, when the so-called "industry" fringe benefit expenses of pensions and welfare/clinics appeared to be related proportionately to the hours worked by the longshoremen. Vacation and holidays expenses were and are also related to hours worked. But these expenses are not included in the fringe benefit expenses and assessments in issue herein.

When more and more cargoes moved in containerships and in large containers, lesser hours of longshoremen's labor were required for the same tonnages of cargo, and the ILA began to blame the containership carriers for their reduced hours of labor, and for the increased numbers of hours of guaranteed annual income expense, another of the fringe benefits of the longshoremen. The break-bulk carriers had taken the same views. The Puerto Rican carriers responded to the ILA and to the break-bulk carriers, that the Puerto Rican trade tonnage increased from year to year from 1959 to 1969, and that the Puerto Rican trade was not responsible for the "shortfall" of hours worked by the longshoremen, *first decision*, 14 F.M.C. 94, 98.

Upon further consideration in its second decision, the Commission concluded that while the Puerto Rican carriers were not responsible for the shortfall of hours worked, they were responsible for their share, about 10 percent, of the fringe benefit expense of guaranteed annual income, *second decision*, 15 F.M.C. 259, 271, 272, because GAI was a shipping industry problem. The Puerto Rican carriers were left to pay the fringe benefit expenses of pension, welfare/clinics, and NYSA administration at the man-hour excepted cargo level, but would have to pay GAI on a tonnage basis. Thus, the Puerto Rican carriers had been underassessed for 1969–1971.

As proposed in agreement no. T–2390 for 1969–1971, also for the period 1971–1974, NYSA proposed a similar man-hour/tonnage assessment basis in its agreement no. T–2804. This agreement was placed under investigation in Docket No. 73–34, *New York Shipping Association—Man-Hour/Tonnage Assessment Formula*. Hearing in No. 73–34 was closed conditionally subject to petition for reopening in the event that the so-called settlement agreements previously referred to herein did not settle all the issues in No. 73–34.

The Puerto Rican carriers were assessed and paid their assessments for fringe benefits for the 1971–1974 period on the combined man-hour/tonnage basis. It is their view, and the view of NYSA, that if there had been no voluntary settlements with reference to both the 1969–1971 period of Docket No. 69–57 (agreement no. T–2390) and the 1971–1974 period of Docket No. 73–34 (agreement no. 2804) and if Docket No. 73–34 and agreement no. 2804 had been fully litigated before the Commission and the Courts, that the same assessment basis would have been granted the Puerto Rican carriers for 1971–1974 as for 1969–1971. Thus, it would have

been found that the Puerto Rican carriers were overassessed for 1971–1974. The States Marine group naturally disputes these assumptions.

NYSA calculates overassessments of the Puerto Rican carriers, and NYSA estimates its liability to the Puerto Rican carriers under agreement no. T–2804 for 1971–1974 as $7,457,849 if the matter had been fully litigated. NYSA points out that the same parties protested no. T–2804 as had protested no. T–2390, namely the Puerto Rican, newsprint, and automobile interests. The same formula of assessment was present in both no. T–2390 and no. T–2804 and the issues were the same.

Likewise, NYSA calculates that the Puerto Rican carriers were underassessed for 1969–1971 in the amount of $5,004,344, Exhibit no. 157.

Of course, no one can be certain what would have been the result if agreement no. T–2804 for 1971–1974 had been fully litigated, but what is certain is that the Commission approved settlement agreements no. T–3017 and no. T–3017–3 for the settlement of the Puerto Rican carriers assessments.

Therein (exhibits no. 155 and no. 165 respectively, approved January 16, 1975, and April 22, 1975), it was stated that the settlement agreements were between the ILA, NYSA, and the three Puerto Rican carriers; that the agreements provide for the settlement of the parties' litigation in and the withdrawal of the Puerto Rican carriers from FMC Docket Nos. 69–57 and 73–34; that NYSA and the ILA relinquish all claims to any recoveries in No. 69–57 (for 1969–1971), and will not make further claims against the Puerto Rican carriers regardless of future developments in the proceeding; that with respect to No. 73–34 (for 1971–1974), the Puerto Rican carriers withdraw and waive all rights to any recovery from NYSA, the ILA, or any NYSA–ILA fringe benefit funds regardless of the ultimate disposition of No. 73–34; that proponents of this settlement agreement made statements in support of the settlement agreement; that in reply the States Marine group stated that it had no direct interest in the settlement and that the States Marine group only sought a clarifying condition to the Commission's order of approval of agreement no. T–3017 that this group's rights to refunds for the 1969–1971 period would not be affected; the Commission stated that it believed that its action approving agreement no. T–3017 with a condition as explained below is fully consistent with the preservation of all "rights" or "claims" which the States Marine group acquired by virtue of the second decision of the FMC; that the FMC had not prescribed any particular manner or method of making assessment adjustments; that nowhere did the FMC state in its second decision and order of June 14, 1972, that the only way assessment adjustments could be made in conformance with the FMC's order was by direct cash refunds to the States Marine group; that the FMC's order of approval of the Puerto Rican carriers' settlement agreement is not to be construed as determining that the States Marine group are necessarily entitled to a cash refund; and that the *manner of assessment adjustment*

necessary to satisfy the claims of the States Marine group *as well as the amounts to be paid* are the subject of the implementation phase of Docket No. 69–57 and will be decided therein.

The Commission clearly provided that the implementation phase of the hearing in No. 69–57 et al. would decide the manner of the adjustment and the amount of the adjustment of assessments for the States Marine group. The amount of any adjustment to be determined in the implementation proceeding thus could be anything which the record in the implementation proceeding justified. The amount thus might be large, small, or even zero. The implementation proceeding also could determine the manner of adjustment, including that adjustments might be other than cash refunds. In other words adjustments might be made in other assessments as offsets of the 1969–1971 assessments. The adjustments might be adjustments made in assessments subsequent to September 30, 1971.

Exhibit no. 157 of record shows $689,599 of alleged overassessments for 1969–1971 of the 12 lines in the States Marine group. This compares with the States Marine group's claim of $715,621 as per Exhibit no. 153. The difference is relatively small and unimportant in view of the ultimate conclusions herein.

If the reasoning of the States Marine group is to be given any credence that it was overassessed in 1969–1971 because the Puerto Rican carriers were underassessed in 1969–1971, then it follows that if the Puerto Rican carriers were overassessed in 1971–1974 then the States Marine group was underassessed in 1971–1974. The Puerto Rican settlement agreement was based upon the assumption that the Puerto Rican carriers were overassessed in 1971–1974 and these carriers dropped their claims for any reimbursement or adjustment for 1971–1974 in consideration for the fact that NYSA and the ILA dropped any claims against the Puerto Rican carriers for 1969–1971.

The States Marine group claims that it was overassessed in 1969–1971, but fails to acknowledge that it was underassessed in 1971–1974, and in effect the States Marine group would throw out any consideration of the factual basis on which the Puerto Rican settlement was made.

If the States Marine group is to be given the benefit of the technical, rather than meritorious, argument that only the years 1969–1971 should be considered, then likewise, the States Marine group must be bound by the technical argument that there was no finding in the second decision that the States Marine group was overassessed.

The States Marine group cannot have it both ways, that is, it cannot argue the technicalities in one instance and insist on merits in another. The States Marine group cannot argue that there is merit to its contention that since the Puerto Rican carriers were underassessed in 1969–1971, that ergo concomitantly the States Marine group was overassessed in 1969–1971, unless the States Marine group also admits the merits of the facts that the States Marine group was underassessed in 1971–1974.

The facts are that the dollar figures are greater for 1971–1974 than for 1969–1971. That is, the Puerto Rican carriers were underassessed about $5 million in 1969–1971 and overassessed about $7.5 million in 1971–1974. Similarly, if the States Marine group as alleged was overassessed about $715,000 in 1969–1971, then also it was underassessed about $750,000 in 1971–1974, with allowances being made in the latter figure for the fact that States Marine International, Inc. (including Isthmian Lines), and Meyer Line ceased operations in the Port of New York during the 1971–1974 period. Exhibit no. 157. Thus, there is no merit to the contention of the States Marine group that it was overassessed by NYSA.

Another allegation of the States Marine group relates to the alleged surplus question. The States Marine group in its brief makes claim for the first time for a total of $1,313,000 (brief, page 39) or $1,315,600 (brief, page 38) of an alleged surplus of $9,200,000 in NYSA's fringe benefit funds as of September 30, 1971. The record as to the alleged surplus came from cross-examination of a NYSA witness. And in fact the $9.2 million was a figure for total NYSA activity, which only in part included fringe benefits under agreement no. T–2390. No precise figure was developed for these benefits. The burden here was on the States Marine group which failed to meet its burden of proof. The record shows that this claim for a share of the alleged surplus was never raised at any time in the hearing, the claim was never made the subject of proof, it was never mentioned in the States Marine group's written direct case, or in its oral rebuttal. The States Marine group state on brief that "we have direct rights against the Puerto Rican carriers because that is what this litigation is all about." But the States Marine group is barred from any rights against the Puerto Rican carriers. As an alternative, the States Marine group turns and seeks to exercise a claim against NYSA. In the second decision, there was no finding that the States Marine group was improperly assessed or that it deserved any share of any alleged surplus. What the States Marine group is now trying to do is not to uphold the second decision, but to attack the manner in which NYSA has administered and implemented the assessment formula of agreement no. T–2390. The States Marine group have concocted an alleged right predicated upon the non-existent duty of NYSA under agreement no. T–2390 to conclude the administration of that agreement with a zero balance in its assessment account. Nowhere in agreement no. T–2390 is there any requirement that NYSA must so administer the assessment program. In fact that was a practical impossibility in view of the difficulties in forecasting tonnages and fringe benefit expenses including GAI.

NYSA did not collect assessments under no. T–2390 for its own use, rather it did so as the fiduciary for the fringe benefit funds. NYSA cannot now refund any monies from the alleged surplus, because the surplus has been expended, or to the extent any surplus exists NYSA consistent with labor law and internal revenue service law must utilize its funds for prospective fringe benefit obligations.

The States Marine group were neither overassessed nor underassessed during the period 1969–1974. For the 1974–1977 period the States Marine group on the full tonnage basis will pay less per ton of cargo in fringe benefit assessments than will the containership carriers and other innovators, because all will be paying the same per ton assessments, but in addition the innovators will be paying container royalties. The break-bulk operators including the States Marine group will be paying the same or less assessments per ton of cargo in 1974–1977 notwithstanding the fact that their method of operation is labor intensive and requires about five times as many hours of longshore labor to load a ton of cargo.

In view of all the above circumstances, there is indeed not the tiniest bit of merit to the claim of the State Marine group in these proceedings.

It is ultimately concluded and found that the claim herein of the States Marine group is unjustified and completely without merit; and further it is found that insofar as the said claim is directed against the three Puerto Rican carriers, namely Sea-Land, Seatrain and TTT, the claim is barred by the two-year statute of limitations in the Shipping Act.

All other complaints and outstanding matters in the subject proceedings, to the extent that these matters have not been fully litigated and concluded heretofore, should now be concluded by orders dismissing the subject complaints and by order discontinuing the subject investigation in Docket No. 69–57, on the grounds that either the remaining complaints are without merit or that the parties have dropped their complaints by lack of prosecution.

(S) CHARLES E. MORGAN,
Administrative Law Judge.

WASHINGTON, D.C.,
January 20, 1976.

FEDERAL MARITIME COMMISSION

DOCKET NO. 72-46

AGREEMENT NO. 57-96, PACIFIC WESTBOUND CONFERENCE — EXTENSION OF AUTHORITY FOR INTERMODAL SERVICE

ORDER

September 15, 1976

The Commission instituted this proceeding pursuant to sections 15 and 22 of the Shipping Act, 1916, to determine whether Agreement No. 57-96 (Agreement), wherein the members of the Pacific Westbound Conference (PWC) agree to fix intermodal rates, should be approved, disapproved or modified.[1] Although others were granted leave to intervene in these proceedings, only Seatrain Lines Inc. (Seatrain), Far East Conference (FEC) and Hearing Counsel filed briefs and participated in this proceeding.

After investigation, hearing, and oral argument, the Commission, on July 8, 1975, issued its Report and Order approving the Agreement for 18 months on condition that the Agreement be modified to permit member lines to individually offer intermodal service not only as to minibridge but as to interior intermodal as well, until such time as the Conference implements the authority granted herein by the filing of appropriate tariffs. Approval of the Agreement was further conditioned upon the submission of the modified Agreement within 60 days of the date of the Order, *i.e.*, September 8, 1975. On September 8, 1975, the Commission suspended its July 8th Order.

PWC has now filed a modification of Agreement No. 57-96, which complies with our July 8th Order and a motion requesting that the Commission vacate its Order of September 8th.

THEREFORE, IT IS ORDERED, That the Commission's Order of Suspension of September 8, 1975, is hereby vacated.

[1] A protest to the Agreement and request for hearing was filed by Seatrain Lines, Inc. a named Respondent.

IT IS FURTHER ORDERED, That Agreement No. 57-96, as modified, is approved effective this date.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 72–46

AGREEMENT NO. 57–96, PACIFIC WESTBOUND CONFERENCE EXTENSION OF AUTHORITY FOR INTERMODAL SERVICES

Agreement No. 57–96, granting the Pacific Westbound Conference authority over intermodal rates is approved pursuant to section 15 of the Shipping Act, 1916, subject to certain conditions and limitations.

No modification of Agreement No. 57–96 is warranted in order to restrict the rights of members to vote on matters related to intermodal traffic and tariffs to only those lines who offer and participate in such services, or in order to prohibit the application of conference self-policing procedures to independent intermodal tariffs published by any of its member lines.

Edward D. Ransom and *Joshua Bar-Lev* for Pacific Westbound Conference, respondent.

Marvin J. Coles and *Neal M. Mayer* for Seatrain International SA, respondent.

Elkan Turk, Jr., for Far East Conference, intervenor.

J. Kerwin Rooney for Port of Oakland, intervenor.

Lawrence F. Daspit and *G. B. Perry* for New Orleans Traffic and Transportation Bureau, Board of Commissioners of the Port of New Orleans and Galveston Wharves, intervenor.

Sam H. Lloyd for Georgia Ports Authority, intervenor.

George E. Strange for Houston Port Bureau, Inc., intervenor.

Donald J. Brunner and *C. Douglas Miller* as Hearing Counsel.

REPORT

September 15, 1976

BY THE COMMISSION: (Helen Delich Bentley, *Chairman;* James V. Day, *Vice Chairman;* Ashton C. Barrett and Clarence Morse, *Commissioners*).

The Commission instituted this proceeding pursuant to sections 15 and 22 of the Shipping Act, 1916, to determine whether Agreement No. 57–96, (Agreement) which generally would grant the Pacific Westbound Conference (PWC)authority over intermodal rates, should be approved, disapproved or modified.[1] While the Far East Conference (FEC), and the

[1] A protest to the Agreement and request for hearing was filed by Seatrain Lines, Inc.

Ports of Houston, Baton Rouge, New Orleans, Oakland, and San Francisco as well as the Georgia Ports Authority have all been granted leave to intervene in this proceeding, only FEC has filed briefs. Seatrain Lines, Inc. (Seatrain), a named respondent, and Hearing Counsel have also participated and filed briefs in this proceeding.

Hearings have been held and Administrative Law Judge Stanley M. Levy has issued an Initial Decision disapproving the proposed Agreement to which exceptions and replies to exceptions have been filed. We heard oral argument.

FACTS

The facts and background relevant to the present application as developed in this proceeding are as follows.

The Pacific Westbound Conference operates pursuant to Agreement No. 57 in the trade from the Pacific Coast ports of the United States to ports in the Far East. PWC is currently composed of 21 regular members and four associate members. Thirteen of the regular members are also members of the Far East Conference.

FEC is a conference of 19 member lines providing an all water service from U.S. East Coast ports to ports in the Far East. FEC publishes a tariff naming local rates only, i.e. port-to-port rates.

From its inception, PWC has published both local and overland rates in its tariff.[2] The overland tariff is applicable to cargo originating east of the Rocky Mountains which at the time of the hearing in this proceeding moved under an inland carrier through export bill of lading by inland carriers who have an agreement for interchange of cargo with PWC.

The local tariff of PWC covers all cargo by PWC members in the PWC trade not covered by overland rates. Generally, this is cargo which originates in the local territory west of the Rocky Mountains, but also includes cargo which in fact originates in the overland territory but has not met the requirements for the overland tariff. Local cargo is moved to Pacific Coast ports at exporter's expense.

PWC and FEC generally compete for cargo moving from the large industrial centers in the midwest.[3] The aggregate of inland and ocean rates covered by PWC/OCP service is comparable to the aggregate of inland rates to the port of loading and FEC port-to-port rates. In order to rationalize this competition they have entered into an agreement (FMC No. 8200–2) which permits them to meet and discuss conference rates and rules. Although they may reach agreement on the subjects discussed,

[2] Overland rates, unlike intermodal rates which are joint land/ocean rates, are port-to-port rates. PWC's use of an overland tariff was approved by the Commission in *Investigation of Overland/OCP Rates and Absorptions*, 12 F.M.C. 184 (1969),and is designed, as the Commission explained therein:

> . . . to meet the competition of ocean carriers operating out of Gulf and Atlantic Coast ports to and from the same foreign ports with respect to cargo originating in or destined for the Central or Midwest United States. For such cargo, the effect of overland/OCP tariffs is to make the aggregate freight charge for inland rail plus ocean transportation via the Pacific Coast gateway competitive with such aggregate charge via the Atlantic or Gulf gateway.

[3] PWC does not draw a substantial amount of overland cargo from areas within 200 miles of East and Gulf Coasts.

each conference has a right of independent action. Nothing in the Agreement permits discussion of the relationship between the PWC overland rates and the FEC local rates.

PWC has not in the past assumed jurisdiction over any intermodal rates, whether interior or minibridge. While at least 14 member lines of PWC have individually filed minibridge tariffs,[4] no PWC member has yet filed an *interior* intermodal tariff in the Conference trade.

Nine of the 13 lines which are common members of PWC and FEC have minibridge tariffs on file with the Commission.

Seatrain operates an all-water service from California ports and ports in the Far East and, as such, is a member of PWC. While Seatrain carries both local and overland cargo under the conference tariff, it is not a major carrier of overland cargo when compared to other PWC carriers.[5] Instead, it has concentrated its efforts in offering minibridge services.

In order to strengthen its position in the trade, Seatrain decided it was necessary to penetrate markets on the Atlantic and Gulf Coasts. Since it did not provide direct all water service from Atlantic Coast ports, it entered into arrangements with several railroads for the inland carriage of cargo between Atlantic and West Coast ports. After reaching an agreement with the railroads, Seatrain published a minibridge tariff naming joint through rates from Atlantic and Gulf Coast ports to the Far East. Rates shown in the tariff include rail transportation from Atlantic and Gulf ports to West Coast ports and water transportation from West Coast ports to the Far East.[6] The level of these joint through rates is basically the same as the port-to-port rates established by FEC which serves the Atlantic and Gulf Coasts.[7]

Since minibridge is priced at parity with FEC, it is capable of drawing cargo from all of the areas which have traditionally been served by the FEC. In fact, however, Seatrain is drawing most of its minibridge cargo from areas within 200 miles of East and Gulf Coast ports.

Seatrain characterizes the unit train as an important element of its overall minibridge service, although only about 28 percent of all Seatrain's Atlantic and Gulf Coast traffic destined for the Far East moves via unit train. Nevertheless, Seatrain has been successful in penetrating the Atlantic Coast markets through the use of minibridge. During the last three months of 1972, Seatrain handled 539 minibridge containers westbound. The average revenue to Seatrain for minibridge traffic moving from the Atlantic Coast after the rail division is paid is $1,853.00 per 40-

[4] Minibridge service is defined as receipt of the cargo by an intermodal carrier at a port area rail head for transportation by land, and thereafter transportation by sea, from a port on the opposite coast. Receipt of cargo other than at a port area rail head is denominated interior intermodal service. Both minibridge and interior intermodal rates are joint through rates.

[5] At the time of the hearings in this proceeding, Seatrain was only carrying approximately 15 containerloads of overland cargo on its vessels per month.

[6] Seatrain is generally recognized as being the leader in the development of intermodal minibridge services. In addition to its minibridge service from Atlantic and Gulf Coasts to the Far East, Seatrain also offers minibridge services between West Coast ports and Europe and between New York and Hawaii.

[7] Rates shown in all 14 minibridge tariffs are generally in parity with FEC rates.

foot container. The averaage revenue to the vessel for minibridge cargo moving from the Gulf Coast after the rail division is paid is $1,635.00 per container. In comparison, the average net to the vessel carried under PWC's local tariff is between $1,000.00 and $1,100.00.

In order to obtain the most favorable division of revenues from the participating rail carriers under its minibridge service, Seatrain has utilized the unit train concept. A unit train of up to 60 cars carrying up to 120 containers departs once a week in each direction from North Bergen, New Jersey, and Richmond/Los Angeles, California.

The unit train is able to move cargo between North Bergen and Richmond/Los Angeles in approximately 4½ to 5 days. Seatrain's water service from the West Coast to Japan takes approximately 10 days. Thus, Seatrain's minibridge service to Japan compares favorably with the 16-day all-water service offered by five Japanese member lines of the FEC.[8] It is faster than the all-water service provided by the remaining FEC member lines which require from 21 to 28 days transit time.

Seatrain's minibridge shipments which are not placed aboard unit trains take approximately five to six days to cross the United States. Although this service to the Far East is slightly slower than that of the five Japanese lines, it is faster than the all-water services offered by a number of FEC carriers.

Since the publication of Seatrain's minibridge tariff, 13 other members of PWC have filed similar tariffs, but what little information is available in this record indicates that they are moving little traffic under them. None is using unit trains.

During the year preceding the hearings in this proceeding, Seatrain had reduced rates on approximately 12 commodities below the rates established by FEC. The record indicates that Seatrain lowered rates on these commodities because shippers complained that they could not ship the commodities at the rate levels established by FEC.[9] There is no evidence that PWC has been forced to reduce its overland rates in order to meet minibridge competition.

AGREEMENT NO. 57–96

Agreement No. 57–96 would permit the PWC to (a) broaden its geographic scope to include inland points in the United States and inland points in various Asian nations; (b) in effect, establish port-to-point, point-to-point, point-to-port through and joint rates "with inland connecting carriers or associations thereof" in addition to its conventional port-to-port rates; (c) allow member lines to "publish and utilize individual intermodal tariffs covering only traffic from points at Atlantic and Gulf ports and adjacent land carriers terminals" to destination ports or points

[8] These five Japanese lines, Mitsui, Japan Line, K Line, NYK and Yamashita-Shinnihon, belong to a Commission-approved space charter agreement (Agreement No. 9975).

[9] FEC statistics do indicate, however, that *some* traffic nevertheless moved at those FEC rate levels.

until such time as the PWC "adopts and effectuates a tariff or tariffs which includes such traffic" at which time the individual tariffs must be cancelled; unless "by the Conference action required to adopt or amend tariffs, such individual intermodal tariffs or parts thereof are permitted to remain in effect"; and (d) subject the individual intermodal tariffs to "all applicable provisions of this Agreement No. 57, as amended, the Appendix thereto, the Conference Administrative Regulations, and Rules and Conditions."

THE INITIAL DECISION

The Initial Decision rendered by Administrative Law Judge Stanley M. Levy would withhold approval of Agreement No. 57-96 on the grounds that (1) the record fails to demonstrate any transportation need for the intermodal authority granted therein to the PWC, and (2) the public interest does not require approval of such agreement at this time. It recommends that the proceeding not be discontinued but, rather, that jurisdiction be retained, so that the Commission may act expeditiously if there is brought to the Commission's attention evidence demonstrating that there is a transportation need for such conference authority and that the grant of such authority would not be contrary to the public interest. On other issues raised in the Commission's Order instituting this proceeding, Judge Levy ultimately concludes that:

No modification of Agreement No. 57-96 is warranted nor could it be permitted in order to prohibit the application of self-policing procedures to independent intermodal tariffs published by any member of PWC.

Agreement No. 57 should not be modified to restrict the rights of members to vote on matters relating to intermodal traffic and tariffs.

DISCUSSION AND CONCLUSIONS

Exceptions to the Administrative Law Judge's Initial Decision have been filed by PWC, FEC and Hearing Counsel. Replies to exceptions have been filed by PWC, FEC, Seatrain and Hearing Counsel.

Generally speaking, PWC challenges Judge Levy's ultimate conclusion that Agreement No. 57-96 should not be approved. In so doing, PWC has taken exception to virtually every conclusion of law and finding of fact leading to the Presiding Officer's ultimate conclusion.

FEC largely duplicates the exception of PWC with regard to the burden of justifying inland intermodal authority. In addition, FEC reargues the contention that it, rather than PWC, should be given authority over minibridge.

Seatrain strongly supports Judge Levy's Initial Decision as being "fully supported by substantial, reliable and probative evidence in the record" and urges the Commission to adopt it as its own. In so doing, Seatrain would reject every exception which directly or indirectly supports the approval of Agreement No. 57-96.

While Hearing Counsel believe that Judge Levy has applied the correct standards to determine the approvability of the Agreement, they disagree with the ultimate conclusion reached. They submit that the evidence of record supports the approval of Agreement No. 57-96 with certain limitations.

For reasons set forth below, we are approving Agreement No. 57-96, granting PWC authority over intermodal tariffs for a period of 18 months, without prejudice to a timely

petition for its extension, on the condition that the Agreement be modified to permit member lines to individually offer intermodal service not only as to minibridge but as to interior intermodal as well until such time as the Conference implements the authority granted it herein by the filing of appropriate tariffs.[10] Further, we find that (1) the self-policing provisions of Conference Agreement No. 57 are applicable to independent intermodal tariffs published by any member of PWC, and (2) Agreement No. 57 should not be modified to restrict the rights of Conference members to vote on matters relating to intermodal traffic and tariffs.

Approval of Agreement No. 57–96

The major issue to be resolved in this proceeding is, of course, whether Agreement No. 57–96, which in effect would extend PWC authority over intermodal through joint rate transportation from any place in the United States to any port or point in PWC Far East destination countries for cargo loaded on PWC member line vessels at West Coast ports, should be approved, disapproved or modified pursuant to section 15 of the Shipping Act, 1916. Before addressing ourselves to this question, however, we believe that we should first dispose of the contention advanced by FEC first before the Administrative Law Judge and now before us on exception that it, rather than PWC, is the "appropriate conference to have minibridge ratemaking authority" on traffic moving "westbound . . . from Atlantic and Gulf ports, overland to Pacific Coast ports, and thence by vessel to ports in the Far East."

As the Administrative Law Judge explained in his Initial Decision, FEC's argument that it should control minibridge is predicated on the theory that the loading of goods aboard an oceangoing vessel at a Pacific Coast port is totally irrelevant to the proper location of the ratemaking authority. FEC believes that the more important consideration is that the cargoes involved originate for the most part in areas adjacent to the Atlantic and Gulf ports—ports traditionally served by FEC. Judge Levy rejected FEC's basic contention, concluding that "if any conference is to have authority to promulgate minibridge tariffs for cargo moving from Pacific Coast ports to the Far East it must be PWC and not FEC." Under the circumstances, we believe that the Presiding Officer's assessment and disposition of the matter was entirely proper and well-founded.

Aside from the fact that FEC's proposal is inconsistent with its existing authority and would at the very least require a major amendment to the FEC agreement[11] not presently before us, FEC has failed to present any convincing arguments why it, *rather* than PWC, should be adjudged to be the "appropriate" conference to exercise westbound minibridge jurisdiction to the Far East.

Certainly, we cannot accept on this record FEC's suggestion that it,

[10] This approval is further conditioned upon the submission of the Agreement, modified as required herein, within 60 days of the date of the Order attached hereto.

[11] Although not singularly determinative of the feasibility of FEC's proposal we note that the filing of a minibridge tariff by FEC has, in the past, met with some internal resistance by FEC member lines as evidenced by the fact that when FEC considered amending its organic agreement to include authority over minibridge, it was unable to obtain the unanimous vote required.

rather than PWC, has the greater interest in promoting minibridge because its all-water service is in direct competition with a westbound minibridge service to the Far East where cargo is loaded at West Coast ports. Equally unsupported is FEC's contention that:

> . . . PWC would certainly not be in a position to reconcile the needs of an all-water route from Atlantic and Gulf ports for stability with the motivation of its members to maximize profits or minimize losses on the strictly trans-Pacific route.

FEC's thesis as to why it is the proper conference to assume cljurisdiction over westbound minibridge service out of West Coast ports is both unsubstantiated on this record and directly contrary to the Presiding Officer's finding on this point, to wit:

> [I]f FEC is permitted to establish minibridge tariffs— . . . for shipments out of Pacific clcoast ports—the growth and development of minibridge intermodalism must inevitably be stifled. The *raison d'etre* for FEC is shipping out of Atlantic and Gulf ports to the Far East. Any minibridge service which utilizes Pacific cost ports for shipment to the Far East must necessarily be inimical to FEC members who do not operate out of Pacific coast ports, and to a degree even to the interests of those members who operate out of both coasts. This is so because some members operating out of both coasts may prefer to more fully utilize their all-water service from Atlantic and Gulf ports and limit their carryings from Pacific coast ports to local and overland cargo. Thus there is a strong probability that FEC would establish minibridge rates at a level which prevents minibridge from successfully competing with all-water service.

We have been provided with no sound basis or justifiable reason to disturb this finding. Accordingly, it stands affirmed as does the Presiding Officer's ultimate determination in this matter that if any conference is to be accorded authority over the pertinent minibridge traffic, it should be PWC. We move now to a consideration of whether PWC should be granted the intermodal authority requested.

In denying approval to Agreement No. 57-96, Judge Levy applied the now well recognized principle first enunciated by the Commission in *Investigation of Passenger Travel Agents*, 10 F.M.C. 27, 34-35 (1966) and adopted by the Supreme Court in *F.M.C. v. Svenska Amerika Linien*, 390 U.S. 238, 243 (1968), that conference restraints which interfere with the policies of antitrust laws will be approved only if the conferences can bring forth such facts as would demonstrate that they are "required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act." Because Agreement No. 57-96 was "one involving intermodal authority," the Presiding Officer determined that it required "the most stringent proof of a serious transportation need." Failing to find "any showing of instability or malpractice" by reason of the absence of conference control over intermodal rates, Judge Levy concluded that "[n]o transportation need can thus be said to exist which would warrant approval of the authority sought."

In challenging the findings and legal conclusions reached by the Administrative Law Judge in denying approval to Agreement No. 57-96, PWC first contends that the subject Agreement need not meet the

standards for approval set out in *Investigation of Passenger Travel Agents, supra,* and *F.M.C. v. Svenska Amerika Linien, supra.* On this point PWC takes the position that:

> Such basic agreements should be approved on the basis of the public benefits which Congress recognized they will render the trade. They do not require an ad hoc showing of imminent and serious transportation conditions.

Notwithstanding its position on the applicability of the *Svenska* doctrine to the present agreement, however, PWC argues that in any event, the Presiding Officer erred in finding that "the record fails to demonstrate any transportation need for . . . [PWC] to have authority over intermodal tariffs."

The positions of the other parties to the proceeding on the matter of the approvability of Agreement No. 57–96 and standards to be applied vary considerably. Whhile not actually advocating that the Judge erred in applying the *Svenska* standard, FEC appears to agree with PWC that demonstration of a precedent serious transportation need is not necessary to the approval of Agreement No. 57–96. In any event, FEC feels that it is unrealistic to require a demonstration of existing rate instability before Agreement No. 57–96 can be approved.

In concurring in Judge Levy's decision, Seatrain argues that PWC misconceives the requirement of section 15 and the *Svenska* decision. In this regard, Seatrain submits that Judge Levy's "conclusions concerning the requirements of the *Svenska* case are correct and his application of the *Svenska* doctrine was fully justified by the record." Seatrain urges the Commission to reject any suggestion that Agreement No. 57–96 is a "run-of-the-mill" rate agreement and as such "presumptively" valid and that the Commission should "serve the function of a mere rubber stamp for conference agreements."

While Hearing Counsel do not suggest that the conference has justified the Agreement as written, they believe that the record supports the approval of an agreement of more limited scope. Specifically, Hearing Counsel feel that the Commission should approve an agreement which (1) *excludes* conference authority over interior intermodal services, thereby limiting conference activity to minibridge; and (2) limits the approval of such agreement to 18 months.[12] Hearing Counsel feel that such an agreement is justified by (1) the need to eliminate multiple tariffs and desirability of uniformity of tariffs, and (2) the potential for rate instability and malpractice which exists in the trade. In support of the latter, Hearing Counsel point out that the trade is now overtonnaged and explains that "It is generally acknowledged that overtonnaging leads to malpractices and rate instability as carriers compete for cargo."

Hearing Counsel would withhold from PWC authority over interior intermodal service as being unjustified by the circumstances in the trade.

[12] The 18-month period, Hearing Counsel believe, "will enable the Commission to identify any difficulties which might develop in the implementation of the agreement and reevaluate the need for conference intermodal authority."

They submit that the transportation circumstances which would justify the authority are not present now, nor is there any strong possibility that they will exist in the near future. Except to the extent Hearing Counsel would deny PWC authority over interior intermodal service, we are in general agreement with the position taken by them.[13]

By restricting and precluding individual member lines from publishing tariffs for through intermodal transportation and fixing the rates and charges at which such transportation will be offered, Agreement No. 57-96 constitutes a clear illegal restraint of trade. As such, the Agreement is "contrary to the public interest" unless it can be shown to be justified or warranted "in terms of legitimate commercial objectives" *F.M.C. v. Svenska Amerika Linien, supra,* p. 244. Thus, the Administrative Law Judge correctly held that before this provision of Agreement No. 57-96 can be approved under section 15, and particularly, the public interest standard thereof, the Conference must demonstrate that the Agreement serves a serious transportation need, is necessary to secure important public benefits or is in furtherance of a valid regulatory purpose of the Shipping Act.

PWC's argument that conference ratemaking agreements are somehow immune from the approval standards of section 15, including the public interest consideration of *Svenska,* is not only not supported in any prior court or Commission decision but is wholly inconsistent with the clear language of section 15 itself. Section 15 explicitly requires that the Commission subject to its approval requirements "any agreement" which provides for one or more of the activities specifically set forth in the seven categories enumerated therein one of those being the "fixing or regulating [of] transportation rates." As Hearing Counsel have pointed out "there are no exceptions." Nor is there any presumption which automatically exempts from the standards of section 15 all conference ratemaking agreements, or for that matter, any other class or type of agreement or arrangement which otherwise falls within the coverage of that section. PWC's arguments to the contrary while extensive and ingeniously presented and briefed are without basis in law or fact and must be rejected.

Similar arguments by PWC advocating the general inapplicability of section 15 standards to conference ratemaking have already been considered and rejected by the Commission in *Agreement No. 8760-5—Modification of the West Coast United States and Canada/India, Pakistan, Burma and Ceylon Rate Agreement,* 17 F.M.C. ____(1973). In that case, we expressly ruled that "the applicable standards justifying

[13] Hearing Counsel also object to the procedure adopted by Judge Levy, wherein he would disapprove the Agreement but retain jurisdiction over it by continuing the proceeding. Hearing Counsel view this as a device to ensure that Seatrain cannot vote on any minibridge amendment to PWC's basic agreement which it would otherwise be entitled to do and know of no regulatory purpose to be served by such procedure, especially since the Commission has other tools at its disposal to control malpractices. In view of the manner of our disposition of the issues in this proceeding and our approval of Agreement No. 57-96, we need not address ourselves to the merits or wisdom of the Presiding Officer's recommendation that the Commission should retain jurisdiction over a disapproved agreement.

continued overland ratemaking authority are spelled out in section 15 itself." We would have thought that this unequivocal statement coupled with our general disposition of the issues raised in that proceeding would have laid to rest the matter of applicability of section 15 standards to conference ratemaking. Judging from PWC's reargument of that same matter here and continued insistence that section 15 somehow contemplates an exemption for conference ratemaking agreements, we were obviously mistaken. Lest there be any further misunderstanding, however, we intend to leave no doubt in this opinion that *all* conference ratemaking arrangements are subject to the approval standards of section 15.

Even simple conference ratemaking arrangements involve the antitrust and public interest considerations that were present in *Svenska* and gave rise to the doctrine adopted therein because even simple conference ratemaking arrangements involve the concerted *fixing* of rates which is *per se* unlawful under the antitrust laws unless specifically granted immunity under section 15. And like all agreements contemplated by section 15, they must be considered individually, on their own merits, based on all the available information and facts of record.

But while all conference ratemaking agreements are required to meet the standards for approval set forth in section 15, as construed in *Investigation of Passenger Travel Agents, supra,* and *F.M.C. v. Svenska Amerika Linien, supra,* the extent of the justification that need be shown for such approval will, of course, vary from case to case with the intensity of the otherwise "illegal restraint" involved. Thus, the "legitimate commercial objectives" which the Commission will accept as evidencing the necessity for the restraint will generally be determined by the type and scope of the agreement under consideration. This we made clear in our Adoption of Initial Decision in *Agreement No. 8760–5—Modification of the West Coast United States and Canada/India, Pakistan, Burma, and Ceylon Rate Agreement, supra,* where we explained that, "As indicated in *Svenska,* the scope and depth of proof required from case to case may vary in relation to the degree of invasion of the antitrust laws." Because of the intermodal aspects of Agreement No. 57–96, the Administrative Law Judge would require as justification for its approval only "the most stringent proof of a serious transportation need." We cannot agree.

Agreement No. 57–96 involves after all only an extension of the Conference's existing and approved ratemaking powers. The Conference's basic authority to establish rates and charges port to port, as well as OCP, have obviously already been considered by this Commission or its predecessors and found fully justified and warranted, or else it would not stand approved. So we are concerned here only with conference ratemaking as it applies to intermodal tariffs and traffic. Since the amendment before us represents but an extension of the Conference's established ratemaking authority under its organic agreement and because intermodalism, as it relates to the through movement of cargoes and the

shipper benefits that may be derived therefrom, is generally desirable, we believe that the proof that need be demonstrated to support the approval of Agreement No. 57–96 is considerably less stringent than that the Presiding Officer would require.

Without confusing statistics with the law, as PWC appears to have done here,[14] we would point out that the Commission has in fact to date approved numerous agreements granting conferences intermodal ratemaking authority. While this falls far short of clothing such agreements with a "presumptive validity," it does indicate that the Commission has generally found them to be in the public interest. On the basis of their high rate of approval, we believe that we can properly characterize these types of intermodal agreements as generally acceptable. This is not to say, however, that Agreement No. 57–96 or other like agreements granting conferences intermodal ratemaking authority will be approved summarily merely because similar agreements have been found warranted and approved by the Commission under section 15 in the past. The public interest cannot be served by such tokenism rubber-stamping of submitted agreements and the Commission will not so abdicate its responsibility to assure that "the conduct legalized [by such agreements] does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purpose of the regulatory statute." *Isbrandtsen Co. Inc. v. United States*, 211 F. 2d 51, 57 (D.C. Cir. 1954).

Here, applying the standards of section 15 as interpreted in *Svenska*, we find on this record that the approval of Agreement No. 57–96 is "required by a serious transportation need," and will serve "to secure important public benefits." There are some definite legitimate commercial objectives to be derived from the approval of Agreement No. 57–96, one of which is the elimination of the multiplicity of minibridge tariffs which exists under the present system of allowing each PWC member line to file its own individual tariff.

We believe the Administrative Law Judge himself presented the strongest case for the desirability of a single source of tariffs when he stated in his Initial Decision that:

> In regard to the present multiplicity of minibridge tariffs it is true that the rate changes are not always made simultaneously. For example, on June 1, 1972, FEC placed a general rate increase in effect. Despite advance notice of the increase, some minibridge operators did not file a corresponding increase for two to three months. Further, a shipper, in order to be certain of obtaining the lowest rate available, must consult as many as 14 tariffs. Undoubtedly, this is inconvenient and might represent a considerable

[14] Referring to some 24 agreements extending the ratemaking authority of conferences to intermodal traffic without a hearing, PWC argues that this "indicates that the Commission has regarded such agreements as presumptively in the public interest." PWC goes on to suggest that the Commission should consider Agreement No. 57–96 to be likewise "presumptively valid" and approve it in the absence of proof that it is detrimental to the commerce of the United States or contrary to the public interest. Since Seatrain formally protested the Agreement, PWC believes that it had the burden of adducing such proof which Seatrain has allegedly failed to do. For reasons heretofore stated, this argument is wholly without merit. There is no presumption in favor of conference ratemaking agreements. Each must be considered on its own merits and approved in light of the standards of section 15. This the Commission has done with regard to each intermodal agreement which has come before it whether approved with or without hearing and any suggestion to the contrary is wholly unfounded and unsubstantiated.

burden if large numbers of commmodities were being shipped. Moreover, the expense of maintaining 14 tariffs could be substantial. A shipper witness indicated that it would be necessary to employ additional personnel in order to keep the tariffs current, though tariff services are available for that purpose. There are also a number of differences in minibridge tariff rules. For example, the minimum charge per container varies between carriers. Some carriers extend credit to shippers while others do not. The prepayment of freight is required by some and not by others.

In spite of these findings and his added observation that "it would be simpler for shippers to look to a single rather than multiple tariff," the Presiding Officer somehow concluded that the multiplicity of intermodal tariffs did not "demonstrate that important public benefits would result if they were well replaced with a single conference tariff." We believe that the Administrative Law Judge's conclusion flies in the face not only of his own unequivocal findings but his own reasoning as well. The facts and realities of the situation speak for themselves.

Undoubtedly, under the present system, a shipper in order to obtain the lowest rates available and most favorable rules as is his want, must continually consult some 14 separate tariffs. This is clearly time consuming and most inconvenient to the shipper and the burden involved will obviously increase with the number of commodities to be shipped. As a result, it follows that it is difficult for some shippers to obtain the benefits of minibridge and the full advantages of that intermodal service are never realized. Therefore, taking the Presiding Officer's own finding to their logical and obvious conclusion, it is clear that the elimination of a multiple intermodal tariff will confer important public benefits which must be given considerable weight in determining the approvability of Agreement No. 57–96.

In connection with our discussion of the virtues of a single source of intermodal tariffs, we point out at this juncture that probably the single most important public benefit that Agreement No. 57–96 can be expected to provide derives from the advantages that conference authority over intermodal rates will offer. This is a point we have alluded to earlier in this opinion and will discuss more fully here. The intermodal movement of cargoes, allowing as it does for continuous movement under a single bill of lading with less handling, provides an essential transportation service to shippers and consignees. As such, intermodalism as a concept is to be encouraged, fostered and promoted. The conference system, we believe, provides the manner by which the development of intermodalism can be most effectively accomplished in the individual trades. As we stated in *Disposition of Container Marine Lines*, 11 F.M.C. 475, 482 (1969): "The conferences, as the dominant commercial units in this trade, in our opinion, should be at the forefront in stimulating and encouraging improvements in transportation."

Not only can the conferences provide the necessary incentives to the institution and implementation of intermodal services but also they can ensure its healthy development. Uniformity of tariff rules is one of the desirable benefits that can be expected to result from the approval of

Agreement No. 57-96. Clearly, conference authority over intermodal rates and traffic, especially during this period of changing transportation systems and concepts, is an important public benefit that militates in favor of the approval of agreements such as the one under consideration here.

In addition to the clear and present benefits that can be derived from Agreement No. 57-96 by virtue of the elimination of the inconveniences and burden to shippers and consignees which naturally flow from the existence of multiple intermodal tariffs, and conference jurisdiction over intermodal rates generally, the approval of Agreement No. 57-96 is also warranted by transportation circumstances and therefore will serve to fulfill a transportation need. As Hearing Counsel point out, although the Conference has not demonstrated any present rate instability or evidence of malpractice, there is definitely potential for both. In short, the conditions and circumstances which have historically led to instability and resulting malpractices in a trade are present here. There is testimony in this record offered by several witnesses that the trade served by PWC, i.e. the U.S. West Coast/Far East Trade (Westbound), is overtonnaged and it is generally acknowledged that overtonnaging invariably gives rise to rate instability and malpractices as the carriers in the trade compete for the available cargo. And when one considers the number of individual minibridge carriers that are competing for the available cargo, the potential to instability becomes very real indeed.

In view of the foregoing, we find and conclude that the threat to stability posed by the existing conditions in the subject trade, which, we might add, can only be expected to continue, if not further deteriorate, as minibridge grows, coupled with the disadvantages which are inherent in a multi-tariff system fully support PWC's jurisdiction over intermodal tariff and traffic, both interior and minibridge.

Hearing Counsel would deny PWC authority over interior intermodal service[15] on the grounds that present transportation circumstances do not warrant it. Hearing Counsel's position appears to us to be somewhat shortsighted and at odds with their stand on the minibridge aspects of Agreement No. 57-96, unless of course, the Commission is expected to await the actual advent of instability, malpractices and the institution of a hodge-podge of differing interior intermodal tariffs before it can act.

Since as of the time of the close of the record here no PWC carrier had filed an intermodal tariff to the Far East other than minibridge, any grant of interior intermodal authority *must* of necessity rest upon potential rather than actual traffic considerations. In this regard, we find considerable merit in PWC's argument that the identical situation which we found

[15] The Administrative Law Judge defined "interior intermodal" as follows:

If minibridge were extracted from Far East intermodalism via the west coast, the remainder would be what has been referred to in this proceeding as "interior intermodal."

existed with regard to minibridge service can be expected to arise in interior intermodal if it is not placed under conference.

Interior intermodal presents an equal if not greater threat to stability than does minibridge if only because the volume of cargo potentially available in intermodal operations from the industrial heartland of the United States exceeds the volume involved in minibridge. Likewise the multiplicity of tariffs can be expected to present even greater difficulties than did with regards to minibridge because of the number of tariffs involved. Under the circumstances, we see no reason or regulatory purpose to be served by limiting the Conference's intermodal authority to minibridge.[16] Accordingly, the approval granted herein extends to interior intermodal as well.

The Administrative Law Judge faults the Conference for not having taken "even preliminary steps leading to implementation of an interior intermodal tariff under the authority it now seeks." To the extent that we understand this objection we find it to be self-defeating. How could PWC be expected to legally implement authority it did not have but now requests? Indeed, if the Conference had taken the "steps" suggested by the Presiding Officer, it could be held to a violation of section 15 for carrying out an unfiled and unapproved section 15 agreement.

While the Administrative Law Judge himself concedes that the Conference's failure to take the "preliminary steps" referred to above "does not *per se* preclude the Commission from approving such authority," he found that it did:

> . . . raise serious questions as to whether such authority if unexercised will seriously inhibit the growth and development of intermodal transportation—thus frustrating a goal which this Commission encourages.

This statement was based in large measure on the fact that unlike minibridge, Agreement No. 57–96, as submitted, does not permit interim individual tariffs.

We share in the Presiding Officer's concern that failure of PWC to expeditiously publish an interior intermodal tariff could deprive the shipping public of benefits which it might otherwise receive if a member line published an intermodal tariff. Accordingly, and consistent with established Commission policy, we are requiring, as a condition to the approval of Agreement No. 57–96, that it be modified to permit PWC member lines to individually offer intermodal service not only as to minibridge but as to interior intermodal as well until such time as the Conference implements the authority granted it by the filing of appropriate tariffs. This requirement should obviate the problem that the Presiding

[16] Nor do we really see any purpose or reason to even distinguish between minibridge and interior intermodal. They are after all both through intermodal services which differ only in terms of distance. As such, we absolutely fail to find any significance to the distinction that Hearing Counsel would draw here.

Officer envisioned should the Conference not implement the requested authority.[17]

PWC has taken the position in this proceeding that if the Commission requires any modification to Agreement No. 57–96, it should be done in a manner that requires no further conference vote on the amendment. The problem arises because the unanimity voting provision in the basic Conference agreement places Seatrain in a position to defeat any modification to Agreement No. 57–96, and if approved conditionally, Agreement No. 57–96 itself.

While PWC's concern is premature we do appreciate the situation in which the Conference finds itself. The fact remains, however, that the Commission cannot itself modify Agreement No. 57–96 without the unanimous approval of the present members of PWC including those members who had no part in the original submission. The Commission simply cannot create or impose an agreement upon parties if no such agreement exists and no cases cited by PWC or arguments advanced by it convince us otherwise. The Commission's standing to amend or modify an agreement under section 15 is always subject to the subsequent acceptance of the amendment or modification by the parties thereto. This is not to state, however, that the Commission is powerless to rectify a situation created when a single conference member line consistently frustrates the wishes of the vast majority by continually casting the one dissenting vote in matters that come before the conference and are presumably in the Conference's interest.[18] There are no facts before us, however, that would in any way indicate that this is the situation here.

Finally, we come to the matter of the duration of the approval granted herein. While Agreement No. 57–96, as submitted, would run indefinitely, Hearing Counsel submit that the Agreement should be limited in duration to a period of 18 months with the understanding that the Conference could seek further approval of the Agreement at the end of the period if it wishes to continue offering intermodal service. Hearing Counsel believe that limiting the approval of the Agreement as suggested by them would "enable the Commission to identify any difficulties which might develop in the implementation of the agreement and reevaluate the need for Conference intermodal authority." PWC advises that it would not object to such a condition.

Hearing Counsel's proposal is consistent with Commission policy to

[17] Of course, we would expect that when and if the Conference adopts intermodal tariffs, it will not do so in a manner which will in any way stifle intermodal shipments. The Conference will not be permitted to do indirectly what it cannot do directly.

[18] The Commission has in the past acted where necessary to remove obstacles which have gone against the wishes of a majority of conference members to take necessary action. *Investigation of Passenger Steamship Conference Regarding Travel Agents*, 10 F.M.C. 27 (1966), *aff'd sub nom. Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968), and Docket No. 70-16, *Modification of Article 8, Agreement No. 5850—North Atlantic Westbound Freight Association*, discontinued by the Commission's Order served August 20, 1970. More recently the Commission issued an Order in Docket No. 73-74, *Modification of Article, Agreement No. 3302—The Association of West Coast Steamship Companies* directing the Respondent therein to show cause why its unanimity voting provision, which, in certain instances, may have resulted in frustrating the desires of a strong majority of the members of Respondent Conference, should not be modified.

avoid granting indefinite and unmited approval of requests by conferences for authority in the intermodal field. Moreover, in this particular case, it will, as the Presiding Officer has noted, "enable the Commission to pinpoint any problems which may develop with the implementation of Agreement No. 57–96." Accordingly, and consistent with the above, we are limiting the approval of Agreement No. 57–96 to 18 months, which we view as being sufficient time to carry out the authority accorded, without prejudice to the Conference petitioning the Commission for its extension within the time specified in the Order attached hereto.

Self-Policing and Voting

In addition to the question of the approvability of Agreement No. 57–96 under the provisions of section 15 and the matter of PWC's prescription of more clearly defined standards governing the Conference's right to prohibit its members from establishing their own intermodal tariffs, the Commission specifically set down for determination in this proceeding the following two issues:

> . . . whether any modification of Agreement No. 57–96 is warranted in order . . . to restrict the rights of members to vote on matters related to intermodal traffic and tariffs to only those lines who offer and participate in such services, or in order to prohibit the application of Conference self-policing procedures to independent intermodal tariffs published by any of its member lines.

Addressing himself to these issues, the Administrative Law Judge after some discussion concluded that "no modification of Agreement No. 57–96 is warranted" either to prohibit the application of self-policing procedures to independent intermodal tariffs published by any member of PWC or to restrict the rights of members to vote on matters related to intermodal traffic and tariffs.

Since no exception was taken to either of these conclusions and since we find that the Presiding Officer's determinations were proper and well-founded, we are adopting so much of the Initial Decision as deals with the "self-policing" and "voting" issues.[19] Those portions of the Initial Decision are attached hereto as an appendix and are incorporated herein by reference.

Motion to Strike Reply to Exceptions

One final matter remains to be considered in this Report. There is pending before the Commission and outstanding at this time a motion

[19] While Hearing Counsel were in complete agreement with those portions of the Initial Decision dealing with voting and self-policing which we are adopting here, they took issue with the statement made by the Presiding Officer on page 39 of the Initial Decision under the heading "Ultimate Conclusions", to wit, that "The self-policing features of Agreement No. 57 are applicable to independent intermodal tariffs published by any member of PWC." Hearing Counsel explain that in the absence of approval of Agreement No. 57–96, they fail to find any justification in the basic Conference agreement upon which to conclude that the self-policing features of Agreement No. 57 are presently applicable. While suggesting that the challenged "Ultimate Conclusion" relating to self-policing was apparently inadvertently made, Hearing Counsel nevertheless submit that it should be amended to conform to the earlier findings of the Presiding Officer on the matter. Hearing Counsel's point is well taken. The ultimate conclusion to which objection is raised was obviously not intended since it is clearly inconsistent with the discussion and finding which preceded it and should accordingly be disregarded.

filed by Seatrain, in which Hearing Counsel join, requesting us to strike certain portions of PWC's Reply to Exceptions, to wit, pages 10–16, as being new material not actually constituting a "reply" to any matter raised on exception.

PWC in its reply to Seatrain's motion concedes that the matter referred to "does deal with new material" but advises that this "new material" relates entirely to two orders of the Commission which are issued subsequent to the filing of PWC's reply brief. PWC thus explains its action as being merely calling the Commission's attention to its own intervening decisions.[20]

Whatever the reasons for PWC's introduction of the matters complained of, it is clear that they do not respond to any thing raised in the exceptions filed by either FEC or Hearing Counsel but rather merely advance further arguments in support of PWC's own exceptions. As such, the challenged matters constitute new material improperly introduced which must be stricken from this record. Accordingly, we are granting Seatrain's motion.

ULTIMATE CONCLUSION

Upon the record herein and for reasons stated above, it is concluded by this Commission that:

1. Agreement No. 57–96, granting the Pacific Westbound Conference authority over intermodal rates, is approved pursuant to section 15 of the Shipping Act, 1916, for a period of 18 months, on the condition that such Agreement be modified to permit member lines to individually offer intermodal service not only as to minibridge but as to interior intermodal as well until such time as the Conference implements the authority granted it herein by the filing of appropriate tariffs. If amended as provided herein, Agreement No. 57–96 will not be unjustly discriminatory, or unfair as between carriers, shippers, exporters, importers or ports or between exporters from the United States and their foreign competitors, or operate to the detriment of the commerce of the United States, or be contrary to the public interest, or be in violation of the Shipping Act, 1916.

Approval of Agreement No. 57–96 is further conditioned upon the submission of the Agreement, modified as required herein, within 60 days of the date of the Order attached hereto. The effective date of this approval shall be the date upon which the Commission shall receive such modified Agreement.

2. The self-policing provisions of Agreement No. 57–96 are applicable to independent intermodal tariffs published by any member of PWC and no modification of Agreement No. 57–96 in this regard is warranted.

[20] While the concern which apparently motivated PWC to introduce the particular matters at issue here is understandable, we would point out that the Commission is perfectly well aware of its own orders and decisions and need not have them specifically called to its attention. As precedent, they will be duly considered where relevant and appropriate.

3. No modification of Agrement No. 57–96 is warranted to restrict the rights of the Conference members to vote on matters related to intermodal traffic and tariffs.

4. The motion filed by Seatrain Lines, Inc. requesting the Commission to strike certain portions of PWC's Reply to Exceptions is granted.

An appropriate order conditionally approving Agreement No. 57–96 and otherwise effecting the above will be entered.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

APPENDIX

EXCERPTS FROM INITIAL DECISION

SELF-POLICING

The Commission requires a determination, among other things, whether modification of Agreement No. 57–96 is warranted in order to prohibit the application of self-policing procedures to independent intermodal tariffs published by any member of PWC.

One of the major purposes of self-policing is to insure that competition between the carriers will be on a service basis rather than price and tariff competition as such. The evidence is that self-policing prevents or at least hinders rebating and, particularly where a trade is overtonnaged, it helps to stabilize the trade. There is a widespread belief that there is a greater tendency to commit a malpractice in any trade where the carriers are not subject to a neutral body, self-policing procedure. Self-policing is so integral a part of a section 15 ageement that the Commission is required by the statute to disapprove any agreement which does not provide for adequate policing of the obligations under the agreement. Thus, anyone who advocates, as does Seatrain, that the self-policing provision of a conference ageement has no applicability to members' activities in intermodal services when that traffic and rates thereunder are not being performed pursuant to any conference tariff has a difficult position to sustain. The essence of such position is the contention that self-policing is limited to those services in which the conference has a tariff interest. That is to say that if the conference has no intermodal authority, or having such authority publishes no intermodal tariff and permits individual tariffs, then the conference is not concerned with price competition as such. Having individual tariffs, the carriers are free to set whatever price level they choose and there is no need to commit malpractice since they can lawfully achieve any desired rate and service level by published tariff.

As in the case of voting practices where the comparison was made to break-bulk carriers voting on container issues being considered by the conference, so in the matter of self-policing applicability to business generated under individual tariffs a reference was made by PWC's witness Purnell of the application of self-policing to open-rated commodities. The open-rated commodity is one in which the conference relinquishes control and the ratemaking authority is left to the individual lines who issue their own individual tariffs on commodities where the tariff filing exemption for bulk without mark or count does not apply. Hence, the situation is the exact equivalent of individual minibridge tariffs in the interim before the

conference publishes its own tariff. Mr. Purnell pointed out that individual tariffs of conference members on open-rated commodities are subject to conference self-policing, stating, "I don't believe that opening a rate gives a carrier license to rebate or to perform any other illegal function that is prohibited in the basic agreement. . . ."

The rationale that self-policing is compartmented and that a conference member is free of its salutary influence in a trade in which the conference members are engaged merely because some aspect of it is not conducted under a conference tariff is erroneous in its underlying concept. Self-policing is a means to an end. The end is that violations of the Act are illegal and should be uncovered. Whether a member carrier is violating the Act in the course of its intermodal activities under an individual tariff or under a conference tariff is irrelevant to the issue of conference responsibility under an approved section 15 agreement. If the conference is to obtain or retain approval, it must exercise that responsibility. Even if the conference were to agree with Seatrain's contention—which it does not—it could not be permitted to abdicate its self-policing responsibilities.

Examination of Agreement No. 57 reveals that the self-policing provision relates to all acts or omissions of the parties which constitute malpractices as define in the agreement and in Schedule A to the agreement. These are not limited to acts or omissions with respect to tariffs published by PWC.

Significantly, Seatrain in its brief ignores any reference to this part of the Commission's order, tacitly conceding that it places no great merit in the proposition that the conference has no self-policing authority with regard to members' minibridge services pursuant to individual tariffs.

Accordingly, no modification of Agreement No. 57–96 is warranted nor could it be permitted in order to prohibit the application of self-policing procedures to independent intermodal tariffs published by any member of PWC.

VOTING

The Commission has required that the proceeding determine whether or not Agreement No. 57–96 should be modified in order to restrict voting on intermodal matters to only those member lines who offer and participate in such services.* To this end evidence was introduced which in large measure established that not all members of a conference provide all of the services offered by the conference; that often members have divergent interests in conference services; that usual conference procedures are to allow all members to vote on all conference matters even though some members may not be participating in the precise service which is the subject matter being voted upon; that despite varying interests or noninterest in specific matters of conference concern the

*The agreement provides that all members vote on all tariff matters and the two-thirds majority requirement under Article 7 applies to intermodal tariffs, local tariffs and overland tariffs.

conference system has not been based on limiting member voting to only those services which the member offers; that matters relating to intermodal traffic and tariffs are not so distinctive from other issues which in the past have been matters of conference concern as to warrant deviating from established conference practice of allowing all conference members to vote on all matters concerning the conference. The outstanding example to which the witnesses referred was the divergent interests between break-bulk carriers and container-oriented carriers where conference rules and regulations concerning containerized cargo were hammered out with the participation of break-bulk members. Conceivably, it might have been to the self-interest of break-bulk carriers to inhibit, hamper or prevent the growth of containerized cargo. This was not in fact what occurred.

PWC's Chairman testified that:

> At the present time all members vote on all rates regardless of whether they engage in the full range of transportation within the jurisdiction of PWC. This is a competitive necessity. All of the rates offered by the Conference are in one way or the other interrelated. Further, member line services are constantly changing. Service not provided by a carrier today may be provided the next day, and vice versa. The expansion of minibridge service is a good example. When Agreement 57-96 was adopted by the Conference and submitted for approval, there were only two or three carriers who had minibridge tariffs on file. At the present time there are at least 14. All members in varying degrees are concerned with every rate the Conference publishes.
>
> * * *
>
> with the adoption of Conference intermodal rates, shippers in overland territory will have a choice of shipping pursuant to either the local, the overland, or the intermodal tariff. Since these tariffs are necesarily interrelated, it would be unthinkable for the Conference to have a separate group within the Conference whcih would consider and vote upon the intermodal tariff excluding all others but at the same time having all members consider and vote upon the overland and local tariffs. It is not inconceivable that such a procedure would result in rate warfare within the Conference upsetting the stability—which conferences are designed to bring about.

In *Maritime Fruit Carriers Co., Ltd. and Refrigerated Express Lines (A/Asia) Pty., Ltd.*, Docket No. 71-80, mimeo p. 6, served May 8, 1972, the Commission said:

> Conference voting mechanisms are at best delicate things, presumably arrived at after due deliberation of alternatives. By and large the various procedures, and they cover a wide range, work well when considered in the light of the large number and variety of agreements existing in our foreign commerce. These considerations, when taken with the continuing change in carrier relationships, trade conditions and economic and competitive circumstances, makes us on the one hand cautious in the interference with existing voting procedures absent a showing of need and on the other, makes it extremely difficult to formulate hard and fast rules for the governance of future voting procedures.

The evidence in this proceeding does not suggest that the development of intermodalism will be hampered or otherwise inhibited by the participation of nonintermodal carriers in conference voting on intermodal matters. Accordingly, no modification of Agreement No. 57-96 is

warranted in order to restrict the rights of members to vote on matters related to intermodal traffic and tariffs. However, the record establishes that it is not the intent of the conference to vote upon rates contained in member's individual intermodal tariffs which are otherwise permitted.

FEDERAL MARITIME COMMISSION

DOCKET NO. 72-46

AGREEMENT NO. 57-96, PACIFIC WESTBOUND CONFERENCE EXTENSION OF AUTHORITY FOR INTERMODAL SERVICES

ORDER

This proceeding having been instituted by the Federal Maritime Commission, and the Commission having fully considered the matter and having this date entered its Report, which Report is hereby referred to and made a part hereof;

IT IS ORDERED, That, pursuant to section 15 of the Shipping Act, 1916, Agreement No. 57-96 among the members of the Pacific Westbound Conference is approved for a period of 18 months on the condition that such Agreement be modified to permit the Conference member lines to individually offer intermodal service as to interior intermodal traffic as well as to minibridge traffic until such time as the Conference implements the authority conditionally granted it herein by the filing of appropriate tariffs.

IT IS FURTHER ORDERED, That the approval of Agreement No. 57-96 is further conditioned upon the submission of the Agreement, modified as required herein, within 60 days of this Order. The effective date of this approval shall be the date upon which the Commission shall receive such modified Agreement.

IT IS FURTHER ORDERED, That the conditional approval granted herein is without prejudice to the filing of an application for its extension. Any application for extension of the period of approval must be filed with the Commission with certificate of service upon all parties to the present proceeding not later than the 60th day prior to expiration of the approval here given.

FURTHER, IT IS ORDERED, That the Motion to Strike Reply to Exceptions filed by Seatrain Lines, Inc. in this proceeding is hereby granted.

FINALLY, IT IS ORDERED, That this proceeding be discontinued.
By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-39

CATERPILLAR OVERSEAS, S. A.

v.

SOUTH AFRICAN MARINE CORPORATION (N.Y.)

NOTICE OF ADOPTION OF INITIAL DECISION

October 27, 1976

No exceptions having been filed to the initial decision in this proceeding, and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on October 27, 1976.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 76-39

CATERPILLAR OVERSEAS, S.A.

v.

SOUTH AFRICAN MARINE CORPORATION (N.Y.)

Adopted October 27, 1976

A common carrier by water is an indispensable party to a complaint proceeding seeking reparation for alleged overcharges. Process served upon a single respondent, alleged in the complaint to be a common carrier by water but, who, in fact, is not, is a nullity. The defect is jurisdictional and may not be remedied. Complaint dismissed.

William Levenstein for complainant.

Seymour Kligler for respondent.

INITIAL DECISION OF SEYMOUR GLANZER, ADMINISTRATIVE LAW JUDGE[1]

This is a reparation proceeding in which the complainant, Caterpillar Overseas, S.A., seeks an award of $4,919.53 from the respondent, South African Marine Corporation (N.Y.), for alleged overcharges on nine shipments of engines and parts from New Orleans, Louisiana, to Capetown, South Africa, during the months of June, July and August 1975. The request for relief is predicated upon provisions of United States/South and East Africa Conference Southbound Freight Tariff No. 2, F.M.C. No. 3.

PROCEDURAL BACKGROUND

The complaint was filed pursuant to Rule 11 of the Commission's Rules of Practice and Procedure[2] on July 28, 1976, and was served by the Secretary of the Commission on the following day, July 29, 1976. Respondent's time to answer expired without an answer having been filed. Consequently an Order on Default was entered on August 25, 1976, directing the complainant to file an appropriate motion for default

[1] This decision became the decision of the Commission October 27, 1976.

[2] 46 CFR §§ 502.181 et seq. Rule 11 allows complaint proceedings to be conducted under shortened procedure without oral hearing upon consent of all parties and the approval of the presiding officer.

judgment. Complainant filed a Motion for Default Judgment, but thereafter the respondent moved to vacate the Order on Default.

I granted respondent's motion to vacate the default[3] and directed that respondent's answer to the complaint, which was attached to the motion, be accepted for filing. In view of that action, it was not necessary to rule on the complainant's Motion for Default Judgment. On September 27, 1976, the complainant and respondent filed a Stipulation of Facts and Motion for Authorization to Settle.[4]

FACTS

Paragraph II of the complaint alleged the following:

> The *respondent* above named whose address is One Bankers Trust Plaza, New York, New York, *is a common carrier by water* engaged in transportation between New Orleans, Louisiana and Capetown, South Africa, and as such is subject to the provisions of the Shipping Act, 1916, as amended. At the time of the shipments here involved respondent was a member of the United States/South and East Africa Conference and was a party to that Conference's South Bound Freight Tariff No. 2, F.M.C. No. 3. (Emphasis supplied.)

Respondent's answer generally denied the allegations of the complaint, but in response to paragraph II of the complaint, stated:

> *Admits* that its address is at One Bankers Trust Plaza, New York, New York; *that it acts as agent for three common carriers by water* engaged in transportation between New Orleans, Louisiana and Capetown, South Africa, who are subject to the provisions of the Shipping Act, 1916, as amended, who are members of the United States/South and East African Conference, who are parties to that Conference's South Bound Tariff No. 2, F.M.C. No. 3 and, *except as so admitted, deny the allegations of Paragraph II* of the Complaint. (Emphasis supplied.)

The stipulation was signed by counsel for the complainant on September 22, 1976, and by counsel for the respondent on September 23, 1976. Paragraph 2 of the stipulation provides:

> The *respondent is the general agent* in the United States *for three common carriers by water* engaged in transportation between New Orleans, Louisiana and Capetown [sic], South Africa, and as such are subject to the provisions of the Shipping Act, 1916, as amended; these common carriers are South African Marine Corp. Ltd., Springbok Lines, Ltd., and Springbok Shipping Company, Ltd. (herein, collectively the "Carriers") and respondent and its undersigned attorneys are authorized to act on their behalf in all matters involved in this proceeding. At the time of the shipments here involved, each of the Carriers was a member of the United States/South and East Africa Conference and each was a party to that conference's South Bound Freight Tariff No. 2, F.M.C. No. 3. (Emphasis supplied.)

An examination of the tariff filed by the United States/South and East Africa Conference, Southbound Freight Tariff No. 2, F.M.C. No. 3[5]

[3] Order on Default Vacated, served September 9, 1976.

[4] The answer stated that the respondent did not agree to shortened procedure. See n. 1. However, by entering into the stipulation subsequently, respondent is deemed to have consented to shortened procedure. See *Consolidated International Corporation v. Concordia Line, Boise Griffin Steamship Company, Inc., as Agents*, 14 SRR 1259, 1260 (1975).

[5] See Original and First Revised Page 1.

confirms that at the times in question, South African Marine Corp., Ltd., Springbok Line Ltd. and Springbok Shipping Co., Ltd., were participating carriers and that South African Marine Corporation (N.Y.) was not a participating carrier in that tariff.

DISCUSSION

On the foregoing facts, the proceeding must be dismissed as a nullity. Section 22 of the Shipping Act, 1916,[6] provides in pertinent part:

> That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person. . . .

Paragraph IV of the complaint alleges that the complainant "has been subjected to the payment of rates and charges for the transportation which were when exacted and still are in excess of those lawfully applicable in violation of section 18(b)(3) of the Shipping Act, 1916,[7] as amended." As relevant to this proceeding, the operative portion of section 18(b)(3)provides:

> *No common carrier by water* in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time. (Emphasis supplied).

Thus, the complaint in this proceeding suffers the infirmity of naming, as the sole party respondent, a person who is not a common carrier. Clearly, only the class of persons specified in section 18(b)(3) are amenable to process alleging violations of that section.[8]

The defect is jurisdictional and cannot be remedied in this proceeding. Certainly, the recital in the stipulation that the three common carriers' agent and the agent's attorney "are authorized to act on [the carriers'] behalf in all matters involved in this proceeding" does not make any of those carriers a party. Yet, that status would be indispensable for relief to be afforded under section 22 of the Act. Moreover, under the express provisions of section 22, it is incumbent on the Commission to furnish "a copy of the complaint to such carrier." While it may be the intent of the stipulation to indicate that the agent or its attorney informed the carriers of the complaint, the statute appears to repose exclusive responsibility for the exercise of this function on the Commission, but, even if the stipulation were urging that the function could be performed by another, it does not follow that knowledge of a proceeding commenced against an agent makes the principal a named party to that proceeding.

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[6] 46 U.S.C. §§ 817.

[7] 46 U.S.C. §§ 821.

[8] It should be remembered that the complaint alleged that the named respondent was a common carrier. The fact that the respondent is and was not a common carrier did not become settled until the stipulation was filed. Had the complaint identified the respondent singly as an agent, it is unlikely that the Secretary of the Commission would have served process upon the respondent.

CONCLUSION AND ORDER

I find that a common carrier by water is an indispensable party to a complaint proceeding seeking reparation for alleged overcharges. Process served upon a single respondent, alleged in the complaint to be a common carrier by water but, who, in fact, is not, is a nullity. The defect is jurisdictional and may not be remedied. Complaint dismissed.

(S) SEYMOUR GLANZER,
Administrative Law Judge.

WASHINGTON, D.C.,
September 30, 1976.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 476

RIVIANA FOODS
AND/OR HENRY E. SULLIVAN

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

September 22, 1976

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on September 22, 1976.

It is Ordered, that applicant is authorized to waive collection of $2,999.72 of the charges due from Riviana Foods and or Henry E. Sullivan.

It is Further Ordered, that applicant shall promptly publish in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission on Special Docket No. 476 that effective October 16, 1975, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from October 16, 1975, through November 10, 1975, the rate on 'Olives in Cases or Cartons' is $81.00 W, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is Further Ordered, that waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 476

RIVIANA FOODS
AND/OR HENRY E. SULLIVAN

v.

SEA-LAND SERVICE, INC.

Adopted September 22, 1976

Application granted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

Sea-Land Service, Inc., seeks permission to waive collection of a portion of the freight charges on eleven shipments of olives carried by Sea-Land from Cadiz, Spain, to Jacksonville, Florida. The shipments weighed 213,950 kilos and moved under Sea-Land bills of lading dated October 16, 1975.

The rate applicable at the time of the shipments was $94.75 per 1,000 kilos[2] with aggregate freight charges of $20,677.25 (as per revised attachment 6 to the application). Sea-Land seeks to apply a rate of $81.00 per 1,000 kilos[3] with an aggregate freight of $17,330.95.[4] The application seeks to waive the collection of $2,999.72.

Prior to February 17, 1975, Sea-Land's rate on olives from Spanish ports, including Cadiz, to South Atlantic and Gulf ports, including Jacksonville, was $94.75. Effective that date Sea-Land published a reduced rate of $81.00 to meet the competition of Lykes Bros. Steamship Co., Inc. Lykes' rate on olives was $1,450.00 per 20-foot containers which at a loading of 18 tons per container works out to $80.55 per 1,000 kilos.[5] Sea-Land's intention was to maintain the $81.00 rate so long as

[1] This decision became the decision of the Commission September 22, 1976.

[2] Sea-Land Service, Inc. Tariff No. 169-B, FMC-98, Item 6000 13th Revised Page 19. Page 2 of the application inadvertently states the rate as $94.50.

[3] Sea-Land Service, Inc. Tariff No. 169-B, FMC-98, Item 6000, 14th Revised Page. 19.

[4] A Spanish tax of 2 percent was levied on the ocean freight ($346.58) making the total actually collected by Sea-Land $17,677.53.

[5] Lykes Bros. Olive Freight Tariff No. 1, FMC-49, 17th Revised Page 8. On April 19, 1976, 18th Revised Page No. 8 changed the rate to $80.00 per 1,000 kilos. This rate expires May 31, 1976.

Lykes' rate remained unchanged and in fact the $81.00 rate was renewed on 10th thru 13th revised pages 19. However 13th revised page 19 carried an expiration date of October 9, 1975, and Sea-Land's Genoa office with the "pricing responsibilities for Sea-Land's . . . Westbound service from the Mediterranean to U. S. ports" failed " through complete administrative oversight to send timely instructions" to the home office at Edison, N. J. to "extend or make permanent the $81.00 rate." The oversight was discovered sometime shortly before October 22, 1975, during a discussion between the "stateside pricing division and Genoa, on which date Genoa sent a teletype request to reinstate the $81.00 rate without an expiration date. Fourteenth revised Page 19 containing the $81.00 rate became effective on November 10, 1975. Sea-Land states that "neither the notify party nor the principals of the shipper, Riviana Foods . . . knew or had reason to believe" that the $81.00 had been allowed to lapse; and Sea-Land again states that the lapse was due to a "wholly unintentional oversight." In fact when the notify party Henry E. Sullivan paid the freight he automatically reduced the rate to $81.00.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[6] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

[6] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

The Senate Report[7] states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

The inadvertent failure of Sea-Land to extend the $81.00 rate when it clearly intended to do so presents the kind of situation section 18(b)(3) was intended to remedy and the requested waiver should be granted.

It is therefore found that:

1. There was an inadvertent failure to extend the intended rate beyond its then applicable expiration date;

2. The waiver requested will not result in discrimination among shippers;

3. Prior to requesting permission for the waiver of collection of a portion of the freight charges Sea-Land filed a new tariff setting forth the rate upon which the waiver would be based; and

4. The application was filed within 180 days of the date of shipment.

Accordingly, Sea-Land will be permitted to waive the collection of $2,999.72 from the notify party, Henry E. Sullivan.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
August 31, 1976.

[7] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges*, under *Purpose of the Bill.*

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 478

KURTIN WOOL STOCK CORP.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

October 6, 1976

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on October 6, 1976.

It is Ordered, That applicant is authorized to waive collection of $74.67 of the charges due from Kurtin Wool Stock Corporation.

It is further Ordered, That applicant shall promptly publish in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 478 that effective October 21, 1975, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from October 21, 1975 through November 26, 1975 the rate on 'Rags, including waste materials from textile fabrics, (excluding cotton remnants), in compressed bales, in House to House containers, minimum 30,000 lbs. per container' to Bilbao, Spain only is $55.75 W, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 478

KURTIN WOOL STOCK CORP.

v.

SEA-LAND SERVICE, INC.

Adopted October 6, 1976

Application granted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

Sea-Land is applying for permission to waive collection of a portion of the freight charges on a shipment by the Kurtin Wool Stock Corporation. The shipment consisted of Rags,[2] and weighed 29,723 lbs. It was carried by Sea-Land from Elizabeth, New Jersey, to Bilbao, Spain, under a Sea-Land bill of lading dated November 1, 1975. The rate applicable at the time of shipment was $55.75 per 2240 lbs., minimum 30,000 lbs. (No Discount) contained in Sea-Land Freight Tariff No. 166 FMC–43, Item 6750, 30th Revised Page 110. This rate resulted in aggregate freight charges of $746.65. The rate sought to be applied is $55.75 per 2240 lbs., minimum 30,000 lbs. less 10% House to House discount. (Sea-Land Freight Tariff No. 166, FMC–43, Item 6750, 32nd Revised Page 110). This rate would have resulted in total freight charges of $671.98. Permission to waive collection of $74.67 is sought.

Prior to October 21, 1975, Sea-Land's rate on "Rags" from North Atlantic ports to Spanish ports was $65.00 per 2240 lbs. minimum 13 tons per container, with a rate of $31.00 applying on weight in excess of 13 tons in the same container, not subject to the House to House discount. There was at this time, however, an American Export Lines rate on "Rags" of $55.75 per 2240 lbs. less 10% discount in House to House containers.

In order to meet the competition to Bilbao, Sea-Land's North Atlantic

[1] This decision became the decision of the Commission October 6, 1976.

[2] The full description was Rags, including waste materials from textile fabrics (excluding cotton remnants), in compressed bales, in House to House containers.

pricing division instructed the tariff publishing officer to publish the same rate and conditions "by proposal dated October 17, 1975, specifying effective date of October 21, 1975." The filing was made by telex with an effective date of October 21, 1975. (See 30th Revised Page 110 of Tariff No. 166, *supra*). Although the publication instruction specifically omitted the reference "(NSD)" so that the rate would be subject to the 10% House to House discount authorized by paragraph 2(a)(1) of item 80 on 15th Revised Page 34 of the tariff, both the telex and the entry on 30th Revised Page 34 of the tariff bore the reference "(NSD)" thus precluding the application of the 10% discount. The error was not discovered until after the shipment here, and one other,[3] had moved.

Kurtin's freight forwarder, Robbins Fleising Forwarding, Inc., having learned of error in the tariff publication, deducted the 10% discount of $74.67 when it paid the freight charges on or about November 20, 1975. In summary Sea-Land says:

> As stated hereinbefore, clerical error by Sea-Land's tariff publishing personel caused the telex filing of October 21 to contain the reference [(NSD)] which made the rate not subject to the discount. The publication instructions clearly intended that the rate be affirmatively subject to the discount so that it would be competitively equal to the rate applicable via other carriers. Respondent does not believe that any discrimination will result from a waiver of collection of the under-payment here involved.[4]

The error was corrected on November 26, 1975, by the filing and publication of 32nd Revised Page 110 which made the rate subject to the 10% House to House discount.

The rate sought to be applied here would appear to cover only shipments of a minimum of 30,000 lbs. The shipment of Kurtin weighed 29,723 pounds. When asked how Kurtin's shipment could qualify for the rate sought, Sea-Land amended its application:

> Tariff No. 166, FMC–43, as shown on 20th Revised Title Page . . . is subject to the regulations contained in Sea-land Tariff No. 171, FMC–49. Item 160 of that tariff, as shown on original page 14 . . . is authority for assessing charges on the minimum per trailer weight of 30,000 lbs. as a maximum on the 29,723 lbs. here involved.[5]

Under Item 160 the rate sought by Sea-Land is applicable.if the application otherwise satisfies the criteria of 18(b)(3).

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications*, Rules of Practice and procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a

[3] Sea-Land has filed another Special Docket application to take care of the other shipment. See Special Docket No. 480.

[4] The lack of discrimination is discussed below.

[5] Item 160 of Tariff No. 171, FMC–49 provides:

> The charge for a shipment of lesser weight or measurement quantity shall not exceed the charge for a shipment of a greater weight or measurement quantity of the same commodity.

portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90-298)[6] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[7] states the *Purpose of the Bill:*

[Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

It is therefore found that:

1. There was an error due to an inadvertence in failing to file a new tariff.

2. Such waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate on which such waiver would be based.

4. The application was filed within one hundred and eighty days from the date of shipment.

Accordingly permission is granted to Sea-Land Service, Inc., to waive collection of a portion of the freight charges, represented by $74.67.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
September 14, 1976.

[6] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

[7] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges,* under *Purpose of the Bill.*

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 480

DOUGLAS MATERIAL COMPANY

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

October 6, 1976

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on October 6, 1976.

It is Ordered, That applicant is authorized to waive collection of $74.67 of the charges due from Douglas Material Company.

It is further Ordered, That applicant shall promptly publish in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 480 that effective October 21, 1975, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from October 21, 1975 through November 26, 1975 the rate on 'Rags, including waste materials from textile fabrics, (excluding cotton remnants), in compressed bales, in House to House containers, minimum 30,000 lbs. per container' to Bilbao, Spain only is $55.75 W, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 480

DOUGLAS MATERIAL COMPANY

v.

SEA-LAND SERVICE, INC.

Adopted October 6, 1976

Application granted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

Sea-Land is applying for permission to waive collection of a portion of the freight charges on a shipment by the Douglas Material Company. The shipment consisted of Rags,[2] and weighed 24,642 lbs. It was carried by Sea-Land from Boston, Massachusetts, to Bilbao, Spain, under a Sea-Land bill of lading dated November 17, 1975. The rate applicable at the time of shipment was $55.75 per 2240 lbs., minimum 30,000 lbs. (No Discount) contained in Sea-Land Freight Tariff No. 166 FMC–43, Item 6750, 30th Revised Page 110. This rate resulted in aggregate freight charges of $746.65. The rate sought to be applied is $55.75 per 2240 lbs., minimum 30,000 lbs. less 10% House to House discount. (Sea-Land Freight Tariff No. 166, FMC–43, Item 6750, 32nd Revised Page 110). This rate would have resulted in total freight charges of $671.98. Permission to waive collection of $74.67 is sought.

Prior to October 21, 1975, Sea-Land's rate on "Rags" from North Atlantic ports to Spanish ports was $65.00 per 2240 lbs. minimum 13 tons per container, with a rate of $31.00 applying on weight in excess of 13 tons in the same container, not subject to the House to House discount. There was at this time, however, an American Export Lines rate on "Rags" of $55.75 per 2240 lbs. less 10% discount in House to House containers.

In order to meet the competition to Bilbao, Sea-Land's North Atlantic

[1] This decision became the decision of the Commission October 6, 1976.

[2] The full description was Rags, including waste materials from textile fabrics (excluding cotton remnants), in compressed bales, in House to House containers.

pricing division instructed the tariff publishing officer to publish the same rate and conditions "by proposal dated October 17, 1975, specifying effective date of October 21, 1975." The filing was made by telex with an effective date of October 21, 1975. (See 30th Revised Page 110 of Tariff No. 166, *supra*). Although the publication instruction specifically omitted the reference "(NSD)" so that the rate would be subject to the 10% House to House discount authorized by paragraph 2(a)(1) of item 80 on 15th Revised Page 34 of the tariff, both the telex and the entry on 30th Revised Page 34 of the tariff bore the reference "(NSD)" thus precluding the application of the 10% discount. The error was not discovered until after the shipment here, and one other,[3] had moved. In summary Sea-Land says:

> As stated hereinbefore, clerical error by Sea-Land's tariff publishing personnel caused the telex filing of October 21 to contain the reference [(NSD)] which made the rates not subject to the discount. The publication instructions clearly intended that the rate be affirmatively subject to the discount so that it would be competitively equal to the rate applicable via other carriers. Respondent does not believe that any discrimination will result from a waiver of collection of the under-payment here involved.[4]

The error was corrected on November 26, 1975, by the filing and publication of 32nd Revised Page 110 which made the rate subject to the 10% House to House discount.

The rate sought to be applied here would appear to cover only shipments of a minimum of 30,000 lbs. The shipment of Douglas weighed 24,642 pounds. When asked how Douglas' shipment could qualify for the rate sought, Sea-Land amended its application:

> Tariff No. 166, FMC–43, as shown on 20th Revised Title Page . . . is subject to the regulations contained in Sea-Land Tariff No. 171, FMC–49. Item 160 of that tariff, as shown on original page 14 . . . is authority for assessing charges on the minimum per trailer weight of 30,000 lbs. as a maximum on the 24,642 lbs. here involved.[5]

Under Item 160 the rate sought by Sea-Land is applicable if the application otherwise satisfies the criteria of 18(b)(3).

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications*, Rules of Practice and procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed

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[3] Sea-Land has filed another Special Docket application to take care of the other shipment. See Special Docket No. 478.

[4] The lack of discrimination is discussed below.

[5] Item 160 of Tariff No. 171, FMC–49 provides:

> The charge for a shipment of lesser weight or measurement quantity shall not exceed the charge for a shipment of a greater weight or measurement quantity of the same commodity.

a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[6] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[7] states the *Purpose of the Bill:*

[Voluntary refunds to shippers and waiver or the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

It is therefore found that:

1. There was an error due to an inadvertence in failing to file a new tariff.

2. Such waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate on which such waiver would be based.

4. The application was filed within one hundred and eighty days from the date of shipment.

Accordingly permission is granted to Sea-Land Service, Inc., to waive collection of a portion of the freight charges, represented by $74.67.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
September 14, 1976.

[6] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

[7] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping AQCT, °&°†: Authorized Refund of Certain Freight Charges,* under *Purpose of the Bill.*

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-31

CSC INTERNATIONAL INCORPORATED

v.

WATERMAN STEAMSHIP CORPORATION

ORDER ON REMAND

October 8, 1976

By complaint filed August 18, 1975, CSC International, Incorporated (CSC) seeks reparation from Waterman Steamship Corporation for an alleged freight overcharge in violation of section 18(b)(3) of the Shipping Act, 1916 (the Act), on a shipment described in the bill of lading as Chemicals N.O.S., carried by Respondent from New Orleans, Louisiana to Keeling, Taiwan. The proceeding was conducted under the shortened procedure set forth in Rule 11(a) of the Commission's Rules of Practice and Procedure (Rules) (46 C.F.R. 502.181). Administrative Law Judge Charles E. Morgan (ALJ), issued an Initial Decision dismissing the complaint. The proceeding is before the Commission on exceptions from CSC and Respondent's reply thereto.

The bill of lading covering CSC's cargo is dated August 17, 1973. The complaint asking reparation for the injury caused by the carrier's alleged freight overcharges was received at the Office of the Commission's Secretary on August 18, 1975.

The ALJ, after considering the date of the bill of lading and the date the complaint was received by the Commission, concluded that the complaint was filed one day after the expiration of the two-year limit set out in section 22 of the Act and, on that ground, dismissed the complaint for lack of jurisdiction.

CSC contends that under normal conditions the complaint mailed from New York on August 14, 1975 would have been received by the Commission by August 17, 1975. August 17th, however, fell on a Sunday when the Commission's offices were closed for business. CSC asks that under these circumstances the Commission apply the common law rule for the computation of the two-year period of section 22 of the Act; that it accept the filing of the complaint as timely; vacate the Initial Decision and remand the case to the ALJ for a decision on the merits.

The common-law rule advocated by CSC:

1. excludes the day the cause of action accrued and includes the last day of the period in the count;[1] and
2. permits filing on the succeeding business day when the last day of the period falls on a Saturday, Sunday or legal holiday.

Respondent in reply, points out that the "common law rule" referred to, and relied upon, by CSC is incorporated in Rule 7(a), which specifically excepts from its coverage complaints filed under Rule 5(c).[2] Respondent therefore contends that under its own rules, the Commission should deny CSC's request, adopt the Initial Decision and dismiss the complaint.

The only reference in the Commission's Rules to the computation of the two-year statutory period is found in Rule 7(a) which by express terms makes this method of computing time inapplicable to filings under Rule 5(c), that is complaints seeking reparation filed under section 22 of the Act. The Commission, however, has reserved in Rule 1(j)[3] the right to waive any of its rules, (except one not relevant here) provided such a waiver:

(1) is not inconsistent with any statute; and

(2) is warranted to prevent manifest injustice, or undue hardship.

Rule 1(b) of the Commission's Rules provides that the Commission offices are open from 8:30 a.m. to 5:00 p.m. Monday through Friday (46 C.F.R. 502.2). Thus, the offices of the Commission were closed not only on Sunday, August 17, 1975, the last day of the two-year limitation period, but also on the preceding Saturday, August 16th.

Under these circumstances dismissal of the complaint for late filing would cause undue hardship. To avoid this result the Commission, in the exercise of its discretion, waives pursuant to Rule 1(j) the exception of Rule 5(c) contained in Rule 7(a), so that by making Rule 7(a) applicable to the computation of the two-year period herein, the filing of the complaint on Monday, August 18, 1975, is considered to be timely.

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[1] Filing. . . . is not complete until the document is delivered and received. *United States v. Lombardo*, 241 U.S. 75, 76 (1916).

The ALJ's conclusion that the complaint was filed one day too late must have been based on such a computation, for by excluding August 17, 1973 (the date of the bill of lading) and starting the count with August 18th, 1973, the last day for filing the complaint within the two-year limit would be August 17, 1975. The complaint, as mentioned, was received by the Commission on Monday, August 18th.

[2] Rule 7(a) reads in relevant part:

In computing any period of time under the rules of this Part, *except section 502.63* (Rule 5(c)), the time begins with the day following the act . . . and includes the last day of the period, unless it is a Saturday, Sunday, or national legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday. . . . 46 C.F.R. 502.101. (Emphasis added)

Rule 5(c) provides in part:

Complaints seeking reparation shall be filed within two (2) years after the cause of action accrues (section 22, Shipping Act, 1916). . . . Notification to the Commission that a complaint may or will be filed . . . will not constitute a filing within the two (2) year period. 46 C.F.R. 502.63.

[3] Rule 1(j) states:

Except to the extent that such waiver would be inconsistent with any statute, any of the rules of this part, except § 502.153 (Rule 10(m)) [which refers to appeals from rulings of presiding officers] may be waived by the Commission . . . in order to prevent undue hardship, manifest injustice, or if the expeditious conduct of business so requires. (46 C.F.R. 502.10).

Consequently, the Initial Decision must be vacated and the proceeding remanded to the ALJ for adjudication on the merits.

THEREFORE, IT IS ORDERED, That, the phrase ". . . except § 502.63 (Rule 5(c)) . . ." in Rule 7(a) (46 C.F.R. 502.101) is waived.

IT IS FURTHER ORDERED, That the Initial Decision herein served January 22, 1976, is vacated, and the matter is remanded to the Administrative Law Judge for further proceeding not inconsistent with this Order.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 75-31

CSC INTERNATIONAL, INC.

v.

WATERMAN STEAMSHIP CORP.

ORDER ON REMAND; DISSENTING OPINION

October 8, 1976

Attached hereto is the dissenting opinion of Vice Chairman Morse in regard to the Commission's Order on Remand served in this proceeding October 8, 1976.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

Vice Chairman Morse, dissenting. I oppose the action of the majority for two reasons:

1. The Congress directed that claims for reparations be filed "within two years after the cause of action accrued". The Congress did not say "within two years and one day"—it said "within two years". Nor did the Congress grant us express authority to extend the two-year period. I would deny jurisdiction to grant any extension beyond the two years decreed by the Congress, would adopt the reasoning of the Administrative Law Judge, and would apply the literal reading of the statute.

Section 22 of the Shipping Act, 1916, has been in effect sixty years, and it has never before been held that the Section 22 time limitation may be extended by us. Our own rules, Rule 7(a), specifically excepts from its coverage complaints for reparations filed under Rule 5(c)[4]—thereby indicating our predecessor's opinion they had no jurisdiction to extend the two-year period specified in Section 22. This is a time limitation dealing with business and the business community, and while the community may often be inept in protecting its rights nevertheless it is fully aware of its rights. Here there is no social need to allow flexibility as is the case in personal injury, fraud, and other tort situations where the injured person is often unfamiliar with his rights and statute of limitations.

[4] See Footnote[3], supra.

In my opinion, the decision of the majority constitutes but a loose and unnecessary interpretation of a statute which is stated in precise terms.

2. In my opinion, the majority erred in applying Commission Rule 1(j). There is no "hardship" on this record, let alone "undue hardship". Claimant, by the exercise of ordinary business prudence in auditing its freight bills, should have become aware that it had a claim for reparations months before the expiration of the two-year period. That it may have failed to so become aware would be due to sloppy internal auditing practices, which I find it unnecessary to condone. Delays in the mails were not a new and unknown factor in August 1975. Hence, when claimant observed, as it must have done, that the time for filing was about to expire on Sunday, August 17, 1975, ordinary business prudence on the part of claimant and its counsel would have called for hand delivery to the Commission on Thursday, August 14, or Friday, August 15, 1975, instead of posting the complaint from New York on Thursday, August 14, 1975.

Under these circumstances it is a travesty to say that a waiver of our rules was required to prevent "undue hardship" or "manifest injustice" or required in "the expeditious conduct of business".

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 341(I)

THE FEDERAL MINISTER OF DEFENSE
FEDERAL REPUBLIC OF GERMANY

v.

REPUBLIC INTERNATIONAL FORWARDING COMPANY AND REPUBLIC VAN AND STORAGE OF LOS ANGELES, INC.

ORDER ON REMAND

October 26, 1976

This proceeding was initiated upon the complaint of the Federal Minister of Defense, Federal Republic of Germany (Complainant) against Republic International Forwarding Company (Republic) and Republic Van and Storage of Los Angeles, Inc. (Van & Storage), alleging freight overcharges in violation of section 18(b)(3) of the Shipping Act, 1916 (the Act), on the shipment of an automobile from Arleta, California, to Hamburg, Federal Republic of Germany. The proceeding was conducted under Subpart S—Informal Procedure for the Adjudication of Small Claims, 46 C.F.R. 502.301, *et seq*. The Settlement Officer issued a decision dismissing the complaint. The Commission determined on its own motion to review the decision of the Settlement Officer.

By letter dated November 23, 1973, Mr. Uwe Thele, a member of the Armed Forces of the Federal Republic of Germany, whose overseas assignment had come to an end, received from Respondent an "estimate" of rates for the transportation of household goods and of an automobile, from Arleta, California, to Hamburg, Federal Republic of Germany. The German Military Representative in the United States (Military Representative) approved the shipment and paid the bill.

The "estimate" quoted a rate for household goods of $97.00 CWT for a load of 3,042 pounds and $90.00 for a load of 4,900 pounds. The rate for the automobile was to be $750 in the first instance, and $700.00 when shipped with the heavier load.

The household goods weighing 2,790 pounds were rated at $97.00 per 100 pounds. The bill, including $247.50 for insurance, amounted to $2,953.80. The automobile which weighed 2,950 pounds was rated at

$75.00 per 100 pounds. The bill amounted to $2,212.50 plus $135.00 for insurance. Total freight charges in the amount of $5,301.30 were paid by Complainant.

After payment of the bill, Complainant discovered that, while the household goods had been rated at the the rate agreed to, i.e., $97.00 per 100 pounds, freight charges for the automobile exceeded by $1,462.50 the estimate quoted in Respondent's November 23, 1973, letter.

Complainant's repeated requests for an adjustment of that charge were to no avail. In refusing to honor Complainant's claim, Respondent took the position that the November 23, 1973, offer was valid only for thirty days and that rates were subsequently increased because of the higher cost of fuel and of fluctuations in the money markets. Thereafter, this complaint was filed.

The Settlement Officer dismissed the complaint noting that as a tariff applicable to the shipment could not be located, a determination on whether Van & Storage had collected the proper charges could not be made.

The ruling of the Settlement Officer must be vacated. Dismissal of the complaint under the circumstances presented in the proceeding below would deprive Complainant from obtaining relief, not because it has been established that it is not entitled to reparation, but because of the lack of information needed to decide the claim on its merits. Unanswered, for example, is:

(a) Whether the rates quoted by Republic and the charges collected by Van & Storage were based upon a tariff on file with the Commission?

(b) Who was the underlying ocean carrier and did it have a tariff applicable to this shipment on file?

(c) Who appears as shipper on the ocean bill of lading?

(d) Whether the bill of lading identifies Republic and/or Van & Storage as independent ocean freight forwarders?

These are some of the questions which must be resolved before a determination can be made as to whether Republic and Van & Storage violated the statute and whether Complainant is entitled to the relief requested.

Further, since resolution of these issues may require an evidentiary hearing which is not available under the informal procedure of subpart S of the Rules, the proceeding will be referred to the Office of Administrative Law Judges for adjudication under the formal procedure provided in Subpart T of the Rules (46 C.F.R. 502.311).

THEREFORE, IT IS ORDERED, That the decision of the Settlement Officer be, and hereby is, vacated.

IT IS FURTHER ORDERED, That the proceeding be remanded to the Office of Administrative Law Judges for adjudication under Subpart T of

the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.311 *et seq.*

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 350(I)

UNITED DECORATIVE FLOWER CO., INC.

v.

MAERSK LINE

NOTICE OF DETERMINATION NOT TO REVIEW

October 27, 1976

Notice is hereby given that the Commission on October 27, 1976, determined not to review the decision of the Settlement Officer in this proceeding served October 14, 1976.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 350(I)

UNITED DECORATIVE FLOWER CO., INC.

v.

MAERSK LINE

October 14, 1976

Reparation Denied.

DECISION OF WALDO R. PUTNAM, SETTLEMENT OFFICER[1]

By complaint filed April 5, 1976, United Decorative Flower Co., Inc., (complainant) alleges that Maersk Line (carrier) erred in computing the cubic measurement of a shipment of plastic flowers and foliages from Bangkok, Thailand to Baltimore, Maryland, resulting in an overcharge of $210.63. While a violation of Shipping Act, 1916, is not alleged, it is presumed to be section 18(b)(3) which prohibits the assessment of freight charges in excess of those lawfully applicable at the time of the shipment.

In support of its claim, the complainant furnished a copy of the packing list indicating a total measurement of 798 cubic feet;[2] a copy of the carrier's bill of lading indicating a total measurement of 898 cubic feet; and a copy of a letter from the carrier denying the claim on the basis that it did not have an opportunity to remeasure the cargo while it still was in the carrier's possession.

In response to the complaint, the carrier supplied a copy of the Mate's Receipt showing that the involved cartons were measured upon receipt of the cargo at the Bangkok dock prior to shipment.[3] The bill of lading was prepared using the cubic measurement inserted on the Mate's Receipt arrived at through actual measurement of the cargo.

Here we have a situation where the proper measurement of the cargo was in dispute from the date that the cargo was received by the carrier. According to the facts presented, the shipper and/or the consignee had

[1] Both parties having consented to the informal procedure of Rule 19, 46 CFR 502.301–304 (as amended) this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2] 45 cartons measuring 32½ × 15½ × 28" and 58 cartons measuring 32½ × 15½ × 25½".

[3] 45 cartons measuring 33½ × 16 × 29½" and 58 cartons measuring 33½ × 16 × 27".

ample opportunity to have requested remeasurement by the carrier in accordance with the terms of the carrier's bill of lading which reads in pertinent part:

". . . the Carrier shall be entitled at any time to . . . remeasure . . . any goods, and freight shall be paid on the proper . . . measurement . . . so ascertained. The expenses of and incidental to . . . remeasuring . . . shall be borne by the carrier if . . . Shipper is found to be correct but otherwise such expenses shall be considered as freight and borne and paid by the Shipper, Consignee. . . ."

The responsibilities of the Carrier, insofar as the contents of the bill of lading are concerned, are set forth in section 1303(3) of the Carriage of Goods by Sea Act, 46 USC 1300 *et. seq*. This section requires the carrier to issue, upon demand of the shipper, a bill of lading showing *inter alia* the pertinent information furnished by the shipper in writing as required by sub-paragraph (b). However, sub-paragraph (c) of that section provides that the carrier shall not be bound to show the information supplied by the shipper in the bill of lading in instances where the accuracy of the information is suspect; or in cases where reasonable means of checking such information is unavailable.

It is apparent that not only were the cargo measurement figures supplied by the shipper questionable, but reasonable means of checking such figures were available.

The issue here is whether the cargo should have been rated according to the dimensions set forth on the shipper's packing list or those arrived at through an actual measurement on the docks prior to shipment.

The fact that the cargo was measured on the dock *before* shipment, and the new measurements inserted on the Mate's Receipt were not contested in time for the carrier to verify the correct measurement prior to delivery of the cargo is *prima facie* evidence that packing list measurements were incorrect.

The Commission has held that where the shipment has left the custody of the carrier, and the carrier is thus prevented from verifying the claimant's contentions, the claimant has a heavy ultimate burden of proof to establish his claim.[4]

The record in this proceeding fails to establish that the claimant has sustained the necessary heavy burden of proof required for the award of reparation in this instance; and, accordingly, the request for reparation is hereby denied.

(S) Waldo R. Putnam,
Settlement Officer.

[4] docket no 283(I) *Western Publishing Co., Inc. v. Hapag Lloyd A.G.*, 13 SRR 16 (1972)

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 482

RAYTHEON CO., INC.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

October 27, 1976

No exceptions having been filed to the initial decision of the Administrative Law Judge in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on October 27, 1976.

It is hereby ordered that applicant is permitted to waive collection of $200.70 of the charges otherwise due from Raytheon Co., Inc.

It is further ordered, that applicant shall promptly publish the following notice in its appropriate tariff.

"Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket 482 that effective July 1, 1975, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from July 1, 1975 through January 29, 1976, the rate on 'Missile Systems and Parts, non-hazardous' is $140.00 W/M subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further ordered, that waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 482

RAYTHEON CO., INC.

v.

SEA-LAND SERVICE, INC.

Adopted October 27, 1976

Application granted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

By application filed May 28, 1976, Sea-Land Service, Inc., seeks permission to waive collection of a portion of the freight charges on a shipment of missile systems and parts weighing 14,760 pounds or 6,695 kilograms and measuring 1,773 cubic feet or 50.176 cubic meters shipped December 3, 1975, from Los Angeles to Naples.

Sea-Land offers the following as grounds for granting the application:

(4) In March, 1975 respondent had negotiated with Raytheon a rate of $140.00 per 1000 Kg. or cubic meter, whichever results in greater revenue, on a new commodity classification "Missile Systems and Parts, non-hazardous." Rate was to apply in Sea-Land's rail-water minibridge service from Pacific Coast ports to ports in Continental Europe and the Mediterranean taking Rate Groups 2 and 5 respectively, as provided in its Tariff No. 193, FMC No. 66 and ICC No. 69.

In compliance with its obligation under Section 15 Agreement No. 10052, telegraphic request was made to the Pacific Coast European Conference for approval of its member lines. The conference initially published an all-water contract rate of $144.35 by telegraphic filing effective April 1 and 2 in its Tariff FMC–15, on 6th revised page 154 and 5th revised page 266, respectively (Attachment No. 1). In the reissue of that tariff into FMC–16 effective July 1, 1975 the rate was reduced to the $140.00 sought by Sea-Land, on original pages 163 and 283, respectively (Attachment No. 2). The expiration date of September 30, 1975 attached to the latter publication was subsequently extended and then eliminated. The same rate is still in effect without expiration date.

Sea-Land concurrently published the rate of $140.00 in Item No. 4330 (New) on 7th revised page 156 (Attachment No. 3) of its Tariff No. 193, FMC No. 66 and ICC No. 69, effective May 29, 1975 on statutory notice. However, on 8th revised page 156 (Attachment No. 4), which was issued effective July 1, 1975 along with numerous other pages to incorporate increases into the rates on the tariff pages (Item 4330 was to be

[1] This decision became the decision of the Commission October 27, 1976.

exempted) the rate in Item 4330 were unaccountably dropped from the page by clerical mistake in tariff compilation, instead of simply carrying the rates forward without increase.

The clerical mistake of dropping the rates from Item 4330 was discovered and a publication request dated July 10, 1975 (Attachment No. 5) to restore the rate to Rate Groups 2 and 5 was sent to the tariff publications department. Unfortunately another clerical mistake occurred here when the clerk inserted a rate of $144.00 instead of $140.00 in the Group 5 rate column (see Attachment No. 5) on the proposed manuscript. Consequently, when brought forward on 9th revised page 156 (Attachment No. 6) effective August 28, 1975 the rate of $144.00 became applicable to Group 5 ports, but the previous rate of $140.00 was correctly brought forward to Group 2 ports. An additional clerical error was made when the Group 5 rate was made subject to a minimum quantity of 40 cubic meters per container; this figure was merely the minimum loadibility that could be achieved by the shipper and was not intended to be published as a requirement for application of the rate.

When the erroneous publication of the $144.00 rate to Group 5 was discovered, it was reduced to the correct figure of $140.00 on 11th revised page 156 (Attachment No. 7), issued December 23, 1975 and effective January 29, 1976. Concurrently, on the same page, related rates to Groups 1, 3, 4 and 6 were added to correspond to the rates in Pacific Coast European Conference Tariff FMC–16(See Attachment No. 2). However, in the interim period the shipments that are the subject of this application were made and the rate of $144.00 was charged on them. Knowing that it was a mistake, the shipper's freight forwarder deducted the excess charges amounting to $200.70 when paying the freight bills.

Attachment No. 8 is copy of bill of lading 995–326508 dated December 2, 1975 showing the original billed ocean freight charges of $7,225.34 at the then effective Tariff rate of $144.00 plus surcharge of $244.36 for a total of $7,469.70. In payment a deduction of $200.70 was made from the ocean freight based on the rate of $140.00. It is the open unpaid amount of $200.40, collection of which is here sought to be waived.

On June 18, 1976, Sea-Land filed a Special Docket Application for waiver of collection of freight charges on a similar shipment. See Special Docket No. 483, *Raytheon Co., Inc. v. Sea-Land Service, Inc.*, Initial Decision served September 29, 1976.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications*, Rules of Practice and procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

> The. . .Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper. . .where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping

Act (Public Law 90–298)[2] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[3] states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

The clerical error which led to the failure to file the rate is that which is within the contemplation of section 18(b)(3) of the Act. It is therefore found that:

1. There was a tariff filing error due to inadvertence;
2. The granting of the requested waiver will not result in discrimination among shippers;
3. Prior to applying for permission to waive the collection of a portion of the freight charges, Sea-Land filed a new tariff setting forth the rate upon which the waiver is to be based; and
4. The application was filed within 180 days of the date of shipment.

Accordingly, Sea-Land is granted to waive the collection of $200.70 from Raytheon Company, Inc.

An appropriate notice will be published in Sea-Land's tariff.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
September 29, 1976.

[2] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

[3] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges,* under *Purpose of the Bill.*

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 483

RAYTHEON CO., INC.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

October 27, 1976

No exceptions having been filed to the initial decision of the Administrative Law Judge in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on October 27, 1976.

It is hereby ordered that applicant is permitted to waive collection of $387.71 of the charges otherwise due from Raytheon Co., Inc.

It is further ordered, that applicant shall promptly publish the following notice in its appropriate tariff.

"Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket 483 that effective July 1, 1975, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from July 1, 1975 through January 29, 1976, the rate on 'Missile Systems and Parts, non-hazardous' is $140.00 W/M subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further ordered, that waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 483

RAYTHEON CO., INC.

v.

SEA-LAND SERVICE, INC.

Adopted October 27, 1976

Application granted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

By application filed June 16, 1976, Sea-Land Service, Inc., seeks permission to waive collection of a portion of the freight charges on two shipments of missile systems and parts weighing in aggregate 19,960 pounds or 9,054 kilograms and measuring in aggregate 3,425 cubic feet or 96.928 cubic meters shipped January 6 and 16, 1976, from Los Angeles to Naples.

Sea-Land offers the following as grounds for granting the application:

(4) In March, 1975 respondent had negotiated with Raytheon a rate of $140.00 per 1000 Kg. or cubic meter, whichever results in greater revenue, on a new commodity classification "Missile Systems and Parts, non-hazardous." Rate was to apply in Sea-Land's rail-water minibridge service from Pacific Coast ports to ports in Continental Europe and the Mediterranean taking Rate Groups 2 and 5 respectively, as provided in its Tariff No. 193, FMC No. 66 and ICC No. 69.

In compliance with its obligation under Section 15 Agreement No. 10052, telegraphic request was made to the Pacific Coast European Conference for approval of its member lines. The conference initially published an all-water contract rate of $144.35 by telegraphic filing effective April 1 and 2 in its Tariff FMC–15, on 6th revised page 154 and 5th revised page 266, respectively (Attachment No. 1). In the reissue of that tariff into FMC–16 effective July 1, 1975 the rate was reduced to the $140.00 sought by Sea-Land, on original pages 163 and 283, respectively (Attachment No. 2). The expiration date of September 30, 1975 attached to the latter publication was subsequently extended and then eliminated. The same rate is still in effect without expiration date.

Sea-Land concurrently published the rate of $140.00 in Item No. 4330 (New) on 7th revised page 156 (Attachment No. 3) of its Tariff No. 193, FMC No. 66 and ICC No. 69, effective May 29, 1975 on statutory notice. However, on 8th revised page 156 (Attachment No. 4), which was issued effective July 1, 1975 along with numerous other

[1] This decision became the decision of the Commission October 27, 1976.

pages to incorporate increases into the rates on the tariff pages (Item 4330 was to be exempted) the rate in Item 4330 were unaccountably dropped from the page by clerical mistake in tariff compilation, instead of simply carrying the rates forward without increase.

The clerical mistake of dropping the rates from Item 4330 was discovered and a publication request dated July 10, 1975 (Attachment No. 5) to restore the rate to Rate Groups 2 and 5 was sent to the tariff publications department. Unfortunately another clerical mistake occurred here when the clerk inserted a rate of $144.00 instead of $140.00 in the Group 5 rate column (see Attachment No. 5) on the proposed manuscript. Consequently, when brought forward on 9th revised page 156 (Attachment No. 6) effective August 28, 1975 the rate of $144.00 became applicable to Group 5 ports, but the previous rate of $140.00 was correctly brought forward to Group 2 ports. An additional clerical error was made when the Group 5 rate was made subject to a minimum quantity of 40 cubic meters per container; this figure was merely the minimum loadability that could be achieved by the shipper and was not intended to be published as a requirement for application of the rate.

When the erroneous publication of the $144.00 rate to Group 5 was discovered, it was reduced to the correct figure of $140.00 on 11th revised page 156 (Attachment No. . 7), issued December 23, 1975 and effective January 29, 1976. Concurrently, on the same page, related rates to Groups 1, 3, 4 and 6 were added to correspond to the rates in Pacific Coast European Conference Tariff FMC–16 (See Attachment No. 2). However, in the interim period the shipments that are the subject of this application were made and the rate of $144.00 was charged on them. Knowing that it was a mistake, the shipper's freight forwarder deducted the excess charges amounting to $200.70 on Shipment No. 1 and $187.01 on Shipment No. 2, a total of $387.71, when paying the freight bills.

Attachment No. 8 hereto (two pages) consists of one copy of each bill of lading/freight bill. Page 1 is No. 995–329837. Shipment No. 1, showing sailing date of January 6, 1976 (actual sailing date was January 8, 1976); page 2 is No. 995–330878, Shipment No. 2, showing sailing date of January 16, 1976 (actual sailing date was January 21, 1976.) Each shows charges as originally calculated and billed at the then effective Tariff rate of $144.00 plus surcharges of $244.36 and $227.68 respectively. Underpayments of $200.70 and $187.01, total $387.71, were made on Shipment Nos. 1 and 2, respectively, in the payment of freight charges, representing the difference between the rate of $144.00 published in the tariff and the rate of $140.00 that should have been published. It is the open unpaid amount of $387.71 for which permission to waive collection is sought.

See Special Docket Application 482, *Raytheon Co., Inc. v. Sea-Land Service, Inc.*, for another shipment involving this rate situation.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications*, Rules of Practice and procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

The. . .Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper. . .where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as

may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[2] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[3] states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

The clerical error which led to the failure to file the rate is that which is within the contemplation of section 18(b)(3) of the Act. It is therefore found that:

1. There was a tariff filing error due to inadvertence;
2. The granting of the requested waiver will not result in discrimination among shippers;
3. Prior to applying for permission to waive the collection of a portion of the freight charges, Sea-Land filed a new tariff setting forth the rate upon which the waiver is to be based; and
4. The application was filed within 180 days of the date of shipment.

Accordingly, Sea-Land is granted to waive the collection of $387.71 from Raytheon Company, Inc.

An appropriate notice will be published in Sea-Land's tariff.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
September 29, 1976.

[2] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges*

[3] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges*, under *Purpose of the Bill.*

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-30

AGREEMENTS NOS. 9718-3 AND 9731-5

The evidence of record is not sufficient to support a finding that Respondents, in 1974, had a monopoly of the trade between Japan and the Pacific Coast to of the United States.

The conduct of Respondents pursuant to their agreements numbered 9718 and 9731 has not been shown to be unjustly discriminatory or unfair as between carriers.

While anticompetitive, Agreement Nos. 9718 and 9731 have, through 1974, tended to ameliorate the overtonnaged condition of the transpacific trades, and have contributed towards keeping a high number of common carriers in those trades. Those results are beneficial to the public, and are sufficient to outweigh the anticompetitive effects of Agreement Nos. 9718 and 9731, demonstrated on this record, so as to justify the continuation of Agreement Nos. 9718 and 9731 through August 22, 1977.

The evidence of record does not support a finding that Respondents have unfairly deprived employment to the members of the Marine Cooks and Stewards Union.

T. S. L. Perlman and *William H. Fort* for Marine Cooks and Stewards Union, Petitioner.

Charles F. Warren, George A. Quadrino, and *John E. Ormond, Jr.* for Japan Line, Ltd., Kawasaki Kisen Kaisha, Ltd., Mitsui O.S.K. Lines, Ltd., Nippon Yusen Kaisha, Ltd., Showa Shipping Co., Ltd., and Yamashita-Shinnihon Steamship Co., Ltd., Respondents.

John Robert Ewers, Paul J. Kaller, and *Bert I. Weinstein* for the Bureau of Hearing Counsel.

REPORT

November 1, 1976

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett, Bob Casey and James V. Day, *Commissioners*)

This is an investigation, commenced by Commission order of August 18, 1975, upon petition of the Marine Cooks and Stewards Union. Respondents, six common carriers in the foreign commerce of the United States, plying the trades between Japan and the Pacific Coast of the United States, are: Japan Line, Ltd., Kawasaki Kisen Kaisha, Ltd., Mitsui O.S.K. Lines, Ltd., Nippon Yusen Kaisha, Ltd., Showa Shipping

Co., Ltd., and Yamashita-Shinnihon Steamship Co., Ltd. The Bureau of Hearing Counsel is party to the proceeding by Commission rule.

The subjects of the investigation are the third and fifth amendments, respectively, to Agreement Nos. 9718 and 9731, whereby those two agreements would continue in force and effect through August 22, 1977. Japan Line, Ltd., Kawasaki Kaisha, Ltd., Mitsui O.S.K. Lines, Ltd., and Yamashita-Shinnihon Steamship Co., pursuant to Agreement No. 9718, cooperate among themselves so as to provide a coordinated fully containerized steamship service between ports in Japan and ports in California. Similarly, Nippon Yusen Kaisha and Showa Shipping Co., Ltd., pursuant to Agreement No. 9731, cooperate between themselves to provide a coordinated fully containerized steamship service between ports in Japan and ports in California.

The Marine Cooks and Stewards Union is the exclusive collective bargaining representative of those members of the stewards department employed by American Mail Line, American President Line, Matson Navigation Co., Pacific Far East Line, and States Steamship Co. In seeking this investigation, Petitioner alleged that Agreement Nos. 9718 and 9731 were unjustly discriminatory or unfair as between carriers, were detrimental to the commerce of the United States, and were contrary to the public interest, in that the implementation of the agreements deprived carriers flying the flag of the United States of cargo, resulting in a diminution of jobs for the members of the union.

Pursuant to the Commission's Order of Investigation and Hearing, this matter was assigned to an Administrative Law Judge for public hearing, which was conducted, and presided over by Administrative Law Judge Marshall. Prior to the issuance of an Initial Decision, Administrative Law Judge Marshall became unavailable to the Commission, and this proceeding was reassigned to Administrative Law Judge Kline, who issued an Initial Decision on June 21, 1976. Thereafter, Petitioner, Respondents, and Hearing Counsel, excepted to that Initial Decision, and submitted the matter to the Commission. Because of the expedition desired in this proceeding, oral argument before the Commission was not granted.

The ultimate decision for the Commission in this proceeding is whether Agreement Nos. 9718-3 and 9731-5 should be approved, disapproved, or modified pursuant to section 15 of the Shipping Act, 1916. Both of those agreements will be approved.

Before discussing the merits of the approval or disapproval of those agreements, the Commission will dispose of an ancillary motion filed by Petitioner.

Petitioner has moved the Commission to consolidate this proceeding with Docket No. 76-14, *Agreement No. 10116-1—Extension of Pooling Agreement in the Eastbound and Westbound Trades Between Japanese Ports and Ports in California, Oregon and Washington.* Petitioner argues that the subject matters of the two docketed proceedings are closely related in law and fact, and that the consolidation of those proceedings

will facilitate the Commission's decision in both proceedings. Respondents have replied in opposition to that motion, as has Hearing Counsel. Respondents argue that Petitioner has waited too long to ask for consolidation of the two proceedings, and that the issues of law and fact are not closely related.

Petitioner, in that motion, has also asked for oral argument in this proceeding whether or not the two proceedings are consolidated, but only if a grant of oral argument would not delay the Commission's decision in this proceeding beyond November 1, 1976. Respondents oppose that request also. The grant of oral argument in this proceeding would delay decision beyond November 1, 1976. Consequently, oral argument is not granted.

The decision on whether or not to consolidate two proceedings pending before this Commission is a matter committed to the discretion of the Commission. In Docket No. 76-14 Petitioner and Respondents have filed affidavits and memoranda, and Hearing Counsel have filed a memorandum.

If the Commission were to consolidate Docket Nos. 75-30 and 76-14, at this late date, the Commission would wish to hear oral argument from the parties regarding the applicability of the evidence adduced in each proceeding. Time does not permit the Commission to hear that argument before November 1, 1976, the date upon which both Petitioner and Respondents request that the Commission decide Docket No. 75-30. Consequently, the Commission will not consolidate Docket Nos. 75-30 and 76-14.

The merits of the approval or disapproval of Agreement Nos. 9718-3 and 9731-5 will now be discussed.

Petitioner has excepted to the ultimate decision of Administrative Law Judge Kline that the agreements be approved at all. It is the position of Petitioner that the agreements should be disapproved. Respondents have excepted to the limitation on the number of vessels operated pursuant to Agreement No. 9718 imposed by Administrative Law Judge Kline as a condition of approval of the agreements. It is the position of Respondents that the agreements should be approved as submitted. Hearing Counsel's position is that of Respondents.

Administrative Law Judge Kline ultimately found that Respondents had a monopoly by means of the agreements in question, that the implementation of those agreements by Respondents resulted in unfair competition with adverse consequences to certain U.S. flag carriers, and that the agreements secured important public benefits. Administrative Law Judge Kline ultimately concluded that the agreements, unless modified so as to reduce the number of vessels operated pursuant to Agreement No. 9718 from eight to six, were unjustly discriminatory or unfair as between carriers, detrimental to the commerce of the United States, and contrary to the public interest.

In making those findings and conclusions the Presiding Officer erred.

The Initial Decision is reversed, and this Report is entered in lieu of that decision.

Of some importance to the disposition of this case is Petitioner's exception to the rulings by Administrative Law Judge Marshall prohibiting Petitioner from discovering evidence directly bearing upon Respondents' intention to monopolize.

On September 2, 1975, Petitioner served upon Respondents written interrogatories and a notice of examination upon oral deposition. The interrogatories and notice were directed to each Respondent. The notice of deposition provided for the examination of the six officers of Respondents who signed Agreement Nos. 9718 and 9731 at the inception of those agreements. The deposition was to include matters pertaining to the making, amending, modifying, administering, implementing, and carrying out of those two agreements and other agreements. The written interrogatories, and the motion for production of documents, requested Respondents to identify, describe and provide all communications, written or oral, made by Respondents, or by anybody on Respondents' behalf, to governmental officials or agencies of the United States or Japan, with respect to the agreements; and, similarly, communications to Respondents from such officials.

Respondents objected to the oral depositions, and so much of the written interrogatories and motion for production of documents as inquired into communications prior to the request for approval of the amendments under consideration in this proceeding. On September 17 and 18, 1975, Administrative Law Judge Marshall ruled that:

> The requested information, which concerns respondents' *communications* with the U.S. and Japanese governments regarding the approval of or operation under Agreements 9718 and 9731, will be furnished as allegedly bearing on the impact of the agreements on American-flag shipping in the trade between California, Hawaii, Alaska and Japan.
>
> (Rulings on Interrogatories)

In similar manner, Administrative Law Judge Marshall required Respondents to produce documents which were communications, as aforesaid. However, on September 15, 1975, Administrative Law Judge Marshall ruled that Petitioner would not be permitted to take the depositions of Respondents' chief executive officers because:

> Their testimony as to the purposes of respondents in making these agreements and their intentions and objectives in carrying them out would appear irrelevant as the really meaningful evidence should concern the actual results. Since these agreements have been in operation for more than seven years, intentions and objectives are of little interest when compared to established facts. The remaining matter, concerning the relationship of other agreements in the U.S./Japan trade, does not appear to be within the scope of the issues.
>
> (Rulings on Depositions)

In the view of Administrative Law Judge Marshall, because of the distance which the deponents would have to travel, the taking of the depositions would constitute an undue annoyance and inconvenience.

Thereafter, on October 8, 1975, Petitioner filed a second motion to compel Respondents to produce documents constituting communications among Respondents concerning the agreements under investigation. Before Administrative Law Judge Marshall ruled upon that motion, the Commission modified its Order of Investigation, and informed the Administrative Law Judge that he had too narrowly interpreted the Commission's Order of Investigation. On October 30, 1975, Administrative Law Judge Marshall announced that he was withholding ruling on Petitioner's Motion to Compel Production of Documents; and provided that Petitioner could include discovery requests remaining unsatisfied in its discovery requests to be filed by November 3, 1975.

On that latter date Petitioner served Respondents with written interrogatories, substantially the same as Petitioner's first interrogatories, except that in November Petitioner only requested communications made by Respondents regarding Agreement Nos. 9835 and 10116 (the Pacific Northwest space charter and the revenue pool among Respondents in the transpacific trades, respectively), and communications made to Respondents regarding all of the agreements. Petitioner requested copies of any documents evidencing such communications. Petitioner excluded from its request any documents theretofore provided to Petitioner. Petitioner did not again seek to take the deposition of Respondents' chief executive officers.

Respondents now argue that Administrative Law Judge Marshall was correct in his ruling. However, an intention to monopolize is an element of a violation of section 2 of the Sherman Act, 15 U.S.C. 2. Inquiry of those persons responsible for the negotiation of and the policy determinations made in the implementation of Agreement Nos. 9718 and 9731 would be relevant to the subject matter of this proceeding. Further, in such delicate matters as an intention to monopolize, written interrogatories are not an adequate method of discovering evidence. Therefore, Administrative Law Judge Marshall erred by refusing to permit the deposition by oral examination of Respondents' chief executive officers.

Respondents alternatively argue that Petitioner abandoned this discovery effort. Of the several arguments regarding abandonment advanced by Respondents only the last is persuasive. In that argument, Respondents assert that Petitioner evidenced its abandonment of this discovery request by:

> 5. Failure to subpoena at the hearing either respondents' officials or other employees or representatives. (Respondents' Reply to Exceptions, p. 43)

46 C.F.R. 502.136 provides for the issuance of subpoenas for the attendance of witnesses located in a foreign country. That rule directs that all requests for the issuance of such subpoenas shall be directed to the Commission. Petitioner did not request the Commission to issue a subpoena for the attendance of Respondents' chief executive officers at the hearing. Had it done so, Petitioner would have been able to avoid

Administrative Law Judge Marshall's restrictive interpretation of the Commission's Order of Investigation. Failure to exhaust that remedy evidences that Petitioner abandoned its attempt to interrogate those chief executive officers. Therefore, this exception is denied.

Petitioner has also excepted to rulings by Administrative Law Judge Marshall wherein he prohibited Petitioner from discovering evidence regarding the service offered by Respondents in the Japan-Atlantic Coast of the United States trades, pursuant to Agreement No. 9975 (an agreement similar to those at issue here); and the ruling by Administrative Law Judge Marshall wherein he prohibited Petitioner from adducing evidence at the hearing regarding that service. In view of the disposition made of this case regarding the question of monopoly, as is hereinafter more fully explained, and assuming Administrative Law Judge Marshall was in error in prohibiting that discovery, and in refusing to receive evidence regarding the Japan-Atlantic Coast of United States service, that error is harmless. Even if Petitioner had been permitted to adduce evidence showing the nature of and extent of Respondents' service between Japan and the Atlantic Coast of the United States, that evidence would not be a substitute for the lack of proof of the totality of the trade in the Pacific. Therefore, this exception is denied.

During the entire period covered by this investigation there has existed in the transpacific trades several agreements among carriers serving those trades whereby those carriers fix the rates at which cargo will be carried. Two of those agreements include the Japan-U.S. Pacific Coast trades. They are the Trans-Pacific Freight Conference of Japan/Korea (TPFCJ/K) and the Pacific Westbound Conference (PWC). The former covers the trade from Japan and Korea to Alaska, Hawaii, and the Pacific coast of the U.S. and Canada. The latter covers the trade from the Pacific coast of the U.S. and Canada to Japan, Korea, Taiwan, Hong Kong, Philippines, Viet Nam, Cambodia, Laos, and Thailand.

Each Respondent is and has been a member of both conferences. In addition to Respondents, there were 12 to 15 other members of the TPFCJ/K, and 8 to 13 other members of the PWC during the period under investigation.

Administrative Law Judge Kline found that Respondents, taken as a group, have a monopoly of the Japan to California and the Japan to the United States Pacific Coast conference trades. In order to find that Respondents have a monopoly it is necessary first to define the relevant market in which the monopoly is said to exist. Although the Presiding Officer did not define the relevant market specifically, it appears that he found that market to be the inbound conference trades from Japan to California, and from Japan to the United States Pacific Coast. That definition is not correct.

In order to determine the relevant market it is necessary to consider the services affected and the geographic areas involved. In determining those services it is necessary to identify market alternatives that buyers

may reasonably use for their purposes, a concept of functional interchangeability. *United States v. E. I. DuPont de Nemours and Co.*, 351 U.S. 377, 394, 399 (1956). The concept of substitutes applied to the instant case, compels a conclusion that the relevant market is greater than the inbound conference trades.

The ports of Los Angeles, Long Beach, Oakland, Portland, and Seattle are gateways for shippers and consignees located in areas well beyond the states in which those ports are located. A large quantity of cargo could move alternatively through any of those ports. For that reason the relevant market cannot be geographically less than the U.S. Pacific Coast.

Respondents are liner operators. In addition to the liner operators which are members of the Trans-Pacific Freight Conference of Japan/Korea and/or the Pacific Westbound Conference, at least ten other steamship companies provide liner services between Japan and the U.S. Pacific Coast. Those nonconference liner operators provide an alternative which shippers and consignees may also use for their purposes. In order to determine the share which Respondents have of the relevant market it is necessary to consider the carryings of all liner operators in that market, both conference and nonconference. The Presiding Officer erred, therefore, when he found that Respondents have a monopoly of the inbound *conference* trades because he incorrectly defined those trades as the relevant market.

The record is insufficient to support a finding that Respondents have a monopoly of the relevant market, because it is not possible, on this record, to determine the share which Respondents have of any market greater than the inbound conference trades. Nonconference operators in the Japan-U.S. Pacific Coast trades include Far Eastern Shipping Co., Maersk Lines, Orient Overseas Line, Orient Overseas Container Line, Oyama, Cutlass, Retla, Seaway Express, Scindia Steam Navigation Co., and Shipping Corporation of India.

This record does not contain probative reliable evidence of the volume of cargo carried by those nonconference steamship companies. Exhibit 23, pages 20-23, purport to show the liner service in the Japan-California trades for the calendar years 1971 through 1974, inbound and outbound. The statistics on that Exhibit are given in long tons, whereas the cargo carryings of Respondents are given in revenue tons. There is no means provided to convert those long tons into revenue tons. The data contained on those pages are not consistent with other information in the record, and those differences are not explained. The data purports to be derived from statistics of the Maritime Administration of the Department of Commerce. There is substantial doubt that liner service on those pages of Exhibit 23 is the same service as the liner service understood by the Commission.

Of similar unreliability is Exhibit 23, page 24, which purports to be the revenue tons carried by each member line of the Pacific Westbound Conference in the "California/Japan-Korea trade". The data contained on

that page are not consistent with the cargo statistics provided by individual lines, such as American President Line, Pacific Far East Line, United States Lines, and Sea-Land Service, Inc., and there is testimony in the record to the effect that the data on that table include bulk carryings and tramp carryings at rates other than those set by the Pacific Westbound Conference. Those inconsistencies indicate that that document is not a reliable indicator of the quantities of cargo carried in the Japan-California trade by members of the Pacific Westbound Conference.

Further, what purports to be the cargo statistics of the Trans-Pacific Freight Conference of Japan/Korea for the years 1972 through 1974, found at Exhibit 23, pages 5–7 and 19, do not separately identify cargo originating in Korea, as compared to Japan, or separately identify cargo destined to Canada, Alaska, and Hawaii, as compared to California and the Pacific Northwest.

The deficiencies in evidence indicated above often result when, as here, an exhibit, such as Exhibit 23, consisting of 67 pages of tables, is offered and admitted in evidence without a witness to explain the source of the data contained in the exhibit, how those data were presented in the exhibit, and the differences between the data contained in the exhibit and data contained in other exhibits.

In any event, on this record, Petitioner has failed to prove that Respondents have a monopoly.

The Presiding Officer also found that the decision in 1972 by Respondents to double the fleet of ships operating under Agreement Nos. 9718 and 9731, coupled with the provision by Respondents of twice weekly service between Japan and California and the practice by Respondents of multiple solicitation of cargo (each member soliciting for a single vessel on each sailing), has resulted in ". . . unfair and destructive competition among conference carriers, especially American carriers except Sea-Land." (I.D., p. 42)

About 1966 Matson Navigation Company approached Nippon Yusen Kaisha with a proposal that those two carriers share a container terminal in Japan. NYK approached the Ministry of Transport of the Government of Japan in order to determine if was permissible for NYK to enter into such an agreement with Matson Navigation Company. That inquiry gave rise to a general inquiry into the containerization of the Japan-U.S. Pacific Coast trade. The whole matter was referred by the Ministry to the Shipping and Shipbuilding Rationalization Council, an advisory group to the Ministry of Transport. Thereafter, that council recommended that the trades be containerized, and that Respondents develop a method to do so efficiently. Thereupon, Respondents conferred among themselves, and devised the agreements which came to be known as Agreement Nos. 9718 and 9731. Those agreements were approved by the Ministry of Transport in 1967.

Upon that approval, the Development Bank of Japan loaned to Respondents sufficient monies to permit the building of the fully contain-

erized vessels to be used in the Japan-U.S. Pacific trades. The Development Bank of Japan is an instrumentality of the Government of Japan, and provided subsidy to the Japanese flag shipping companies in the nature of construction loans at a rate of interest below the rates commercially available. The percentage of the cost of any particular vessel which the Bank would loan was directly related to the desirability of the construction of that vessel in the view of the Government of Japan. In the case of the vessels employed by Respondents in the Japan-U.S. Pacific Coast trade, the percentage was quite high. For example, the Bank loaned 80 percent of the cost of construction of the *Hakusan Maru*, employed pursuant to Agreement No. 9731.

Upon receipt of the loans Respondents negotiated with shipbuilding companies for the construction of the containerships. Respondents let contracts for the construction of the vessels one to one and one half years before the vessels were delivered to Respondents. At the inception of these two agreements, it was determined that Japan Line, Kawasaki Kisen Kaisha, Mitsui O.S.K. Line, and Yamashita-Shinnihon Steamship Company would operate four vessels pursuant to Agreement No. 9718, and that Nippon Yusen Kaisha and Showa Shipping Company would operate two vessels pursuant to Agreement No. 9731. Those six vessels were delivered to Respondents and placed in service in the Japan-California trades in the period August through November 1968.

In 1968 an arrangement similar to Agreement Nos. 9718 and 9731 was devised for the Japan-Pacific Northwest trades. It is Agreement No. 9835. At its inception it was decided that the six Respondents would operate three vessels in the Japan-Pacific Northwest trades.

As of 1974 Respondents had 18 containerships in the Japan-U.S. Pacific Coast trades. Those vessels were put in service over several years. Sometime before March of 1970, Respondents agreed to build three more containerships to be used in the Japan-California trades. Sometime before April of 1971 Respondents agreed to build three additional vessels to be used in the Japan-California trades and three additional vessels to be used in the Japan-Pacific Northwest trades. Those vessels were placed in service in the Japan-California trades as follows: to be employed pursuant to Agreement No. 9718, one vessel in November 1971, one vessel in February 1972, one vessel in May 1973, and one vessel in June 1973; to be operated pursuant to Agreement No. 9731, one vessel in April 1972, and one vessel in June 1973. The vessels operated pursuant to Agreement No. 9835 in the Japan-Pacific Northwest trades were placed in service as follows: one vessel in May 1970, one vessel in September 1970, one in December 1971 (which was removed in February 1972 and not replaced until August of 1973), and one each in April, May, and October 1974.

The consortium of four Respondents, operating pursuant to Agreement No. 9718, provides twice weekly service between Japan and California. The consortium of two Respondents, operating pursuant to Agreement No. 9731, provides weekly service between Japan and California. The

consortium of all six Respondents, operating pursuant to Agreement No. 9835, provides weekly service between Japan and the Pacific Northwest Coast of the United States. Those service levels were as of the date of hearing in January 1976.

In 1969 the utilization of Respondents' vessels, in the inbound trade, employed pursuant to Agreement No. 9718, ranged from a low of 68 percent for the *Kashu Maru* to a high of 87 percent for the *Japan Ace*, with an average of 76.5 percent. Similarly, the vessels operated pursuant to Agreement No. 9731 were utilized in 1969 in the inbound Japan-California trade to the extent of 77.6 percent of their capacity. In 1970 the level of utilization for the 9718 group inbound averaged 83 percent, and the utilization for the 9731 group inbound averaged 82 percent. In 1971 the utilization inbound averaged 95.3 percent for the 9718 group, and averaged 93.3 percent for the 9731 group. In all instances, the utilization westbound was less than the utilization eastbound. In the years 1972 through 1974 the utilization of the vessels employed by Respondents in the Japan-California trades declined. In that latter period, as in the former, the utilization was better eastbound than westbound.

As Respondents constructed and added new fully containerized vessels to the Japan-U.S. Pacific Coast trades, they gradually eliminated the older vessels previously employed by Respondents in the liner service between Japan and the U.S. Pacific Coast. During that period, the percentage of all cargo moving on conference vessels which moved in containers increased from 25.6 percent in 1968 to 94.6 percent in 1974.

Pursuant to all three agreements, Nos. 9718, 9731, and 9835, Respondents charter from each other blocks of space on all the vessels employed pursuant to these agreements, which, as of the end of 1974, were eight vessels pursuant to Agreement No. 9718, four vessels pursuant to Agreement No. 9731, and six vessels pursuant to Agreement No. 9835. Consequently, each Respondent may advertise sailings at a frequency greater than that actually performed by the vessel owned by that Respondent. For example, when the *Japan Ace*, owned by Japan Line, calls at Oakland, California, not only does Japan Line advertise the sailing of that vessel under its flag, but Kawasaki Kisen Kaisha, Mitsui O.S.K. Lines, and Yamashita-Shinnihon Steamship Company also advertise the sailing of that vessel under their respective banners, each of those three Respondents having chartered one fourth of the *Japan Ace*. Similar arrangements are followed for each of the other vessels operated pursuant to Agreement Nos. 9718, 9731, and 9835. Consequently, four of Respondents solicit cargo for each sailing of each vessel operated pursuant to Agreement No. 9718, two Respondents solicit cargo for each sailing of each vessel operated pursuant to Agreement No. 9731, and all six Respondents solicit cargo for each sailing of each vessel operated pursuant to Agreement No. 9835. That solicitation by each Respondent is only for the account of the Respondent performing the solicitation; for example, Mitsui is only seeking to fill that quarter of the *Japan Ace* which

Mitsui has chartered. The Presiding Officer referred to that practice as multiple solicitation.

In addition to Respondents, several U.S. flag carriers and several third flag carriers serve the Japan-U.S. Pacific Coast trades. The U.S. flag carriers, during the period 1968–1974, were American Mail Line (AML), American President Line (APL), Matson Navigation Company, Pacific Far East Line (PFEL), Sea-Land Service, States Steamship Company, and United States Lines (USL).

In the period 1968 through 1974 American President Line substantially altered the consist of its fleet. In 1968 all APL vessels were breakbulk. In 1968 APL contracted for the construction of four containerships. In 1971 APL determined to make its fleet a totally containerized operation. APL converted vessels acquired in 1966 and 1968 to containerships by the addition of cellularized midbodies. That conversion was largely accomplished in the latter part of 1973 and the beginning of 1974. In 1974 the four containerships contracted for in 1968 were delivered. By the end of 1974 all of the vessels operated by American President Line were fully containerized. American President Line served only California on the Pacific Coast of the United States. American Mail Line, which merged with American President Line in 1973, served only the Pacific Northwest on the Pacific Coast of the United States. The consist of the American Mail Line fleet is essentially the same as that of American President Line.

In the period 1968 through 1974 the Pacific Far East Line also altered the consist of its fleet. In 1968 it operated breakbulk vessels exclusively, with modest ondeck container capacity. That consist continued through the latter part of 1971, when two LASH[1] vessels were added to the fleet. In 1972 66 percent of PFEL's voyages were by LASH vessels. In 1973 the Japan-California service of Pacific Far East Line used LASH vessels exclusively. The LASH vessel, as it was introduced in the latter part of 1971, carried 50 LASH barges and 550 containers (high cube). Those vessels were later modified so as to increase the number of barges and reduce the number of containers carried on each vessel to 63 barges and 334 containers. In 1968 PFEL decided to commit itself to the LASH type of vessel. The phenomenal growth of containerization in the eastbound transpacific trade was not anticipated by PFEL at that time. As of January 1976, PFEL was considering the addition of containerships to its fleet. PFEL sold two of its LASH vessels to Farrell Lines.

In 1968 States Steamship Company operated only breakbulk vessels, which were capable of also carrying some containers on deck. Of the 13 vessels operated by States in 1968, four of them could carry no containers at all. By 1974 States had reduced the number of vessels operated in the

[1] Lighter Aboard Ship. A vessel which carries cargo in barges which may be removed from the vessel and towed through the water. A LASH barge contains 19500 cubic feet of space as compared to 1050 cubic feet of space in a 20-foot container (TEU) or 1200 cubic feet in a "high cube" 20-foot container (a container which is 8.5 feet in height rather than the 8-foot height of the standard TEU). Cargo carried in a LASH barge is breakbulk cargo, so a LASH vessel is a combination breakbulk/container vessel, and is particularly useful in areas with undeveloped or unsophisticated port facilities.

transpacific trade to 10 vessels, all breakbulk. As of September 1975, States was in the process of constructing four roll on/roll off vessels. States did not appreciably alter the consist of its fleet in the period 1968 through 1974.

United States Lines entered the Japan-California trade in earnest in 1970. That line had carried negligible amounts of cargo in that trade in 1968 and 1969 according to Trans-Pacific Freight Conference of Japan/Korea statistics. In 1971 United States Lines carried a large quantity of cargo between Japan (including Okinawa) and California for the Military Sealift Command (MSC). As the U.S. involvement in Viet Nam decreased, so too did the quantity of cargo which USL carried for the Military Sealift Command. In 1971 U.S. Lines carried 35,762 revenue tons of MSC cargo inbound. In 1972 it was 22,619 revenue tons, in 1973 it was 17,498 revenue tons, and in 1974 USL carried only 4,304 revenue tons of MSC cargo inbound. Since 1970, United States Lines has been fully containerized in the Japan-California trades. The Japan-California service of United States Lines is part of the service it provides between Japan and the East Coast of the United States.

With rare exception, Sea-Land Service, Inc. has operated only full containerships in the trade between Japan and the Pacific Coast of the United States. Sea-Land introduced the first of its large vessels of the type SL–7 to the Japan-Pacific Coast trade in May of 1973. As of September of 1975, Sea-Land provided a Japan-California service with five SL–7 vessels.

The following table indicates the share of conference cargoes each of the U.S. and Japanese flag carriers had in the years 1968–1974.

PERCENT OF TPFCJ/K CARGO CARRIED BY RESPONDENTS AND U.S. FLAG CARRIERS

Carrier	*1968*	*1969*	*1970*	*1971*	*1972*	*1973*	*1974*
America Mail Line	8	8.8	9.6	9.5	9.4	4.4	
American President Line	7.4	7.3	8.6	8.1	8.9	7.3	9.0[1]
Matson Navigation Company	3.5	3.0	3.3				
Pacific Far East Line	6.7	6.7	6.1	5.2	7.0	3.8	2.7
Sea-Land Service	0.2	5.6	13.2	14.7	14.2	14.6	14.7
States Steamship Company	7.3	6.7	8.1	6.8	5.7	4.0	3.9
United States Lines			0.2	3.7	3.3	2.3	2
Japan Line	11.3	10.3	7.8	8.3	9.3	10.4	10.9
Kawasaki Kisen Kaisha	8.5	8.8	7.8	7.2	8.9	11.1	11.1
Mitsui O.S.K. Line	11.0	9.8	8.7	7.8	6.7	7.9	8.7
Nippon Yusen Kaisha	9.9	11.0	9.7	9.1	6.8	9.0	11.1
Showa Shipping Co.	4.6	5.5	5.1	5.6	5.0	5.8	7.6
Yamashita-Shinnihon Steampship Company	11.4	9.5	7.0	7.2	5.5	7.6	9.9

The aggregate share of those conference cargoes carried by the six Respondents in 1968 was 56.7 percent. The aggregate share of the inbound conference cargoes carried by all six Respondents in 1974 was

[1] Includes share of AML, not separately stated in 1974 conference statistics.

59.3 percent. The following Respondents did not carry as great a share of the conference cargoes in 1974 as they did in 1968: Japan Line, Mitsui O.S.K. Lines, and Yamashita-Shinnihon Steamship Company. The other three Respondents carried a greater share in 1974 than they did in 1968. Of Respondents, Yamashita-Shinnihon carried the greatest share in 1968. In 1974 it was Kawasaki and NYK, who each carried 11.1 percent.

The Presiding Officer found that in 1972 Respondents doubled the size of the fleet operated pursuant to Agreement Nos. 9718 and 9731. He further found that that decision, coupled with the other advantages enjoyed by Respondents by reason of those agreements, to be unfair and destructive competition within the conference, particularly in regard to U.S. flag carriers. The Presiding Officer was in error when he found that Respondents in 1972 doubled the size of the fleet operated pursuant to those agreements. The record clearly shows that the decisions were made in early 1970 and 1971, and that the vessels were added to the service in the period between late 1971 and late 1973. Further, as these new containerships were added to the Japan-California trades, Respondents gradually eliminated their older vessels from those trades.

Respondents entered into these agreements so that Respondents could efficiently convert their service in the Japan-U.S. Pacific Coast trades to a fully containerized operation. It was intended from the outset to replace existing vessels with new fully containerized vessels. At the time Respondents decided to build the additional containerships they had available to them the data concerning the utilization of the containerships then in service during the years 1969 and 1970. Those figures showed a high and increasing level of utilization of those vessels. That utilization continued to increase through 1971. Thus, in the process of phasing out older vessels, and phasing in newer vessels Respondents prudently provided for potential trade growth and demand for their vessels, which was reasonable in light of the utilization of those vessels which Respondents had experienced in the earlier years. That the volume of cargo carried in the trade did not increase through 1974 to a degree sufficient to fill Respondents' vessels does not render these agreements unfair. Respondents have, individually and collectively, after transitioning to a fully containerized operation, brought themselves back to the approximate position in the conference which they enjoyed in 1968, prior to the addition of the new fully containerized vessels. That position in the trade alone does not render these agreements unfair.

While it would appear that the efficiency and success of Respondents' coordinated fully containerized service between Japan and the U.S. Pacific Coast, and in particular, between Japan and California, had some effect upon the conference shares held by American President Line, American Mail Line, Pacific Far East Line, States Steamship Company, and United States Lines, Respondents operations were not the paramount cause of the declining shares of those carriers. In 1968, when the trade was largely breakbulk, APL, AML, PFEL, and States enjoyed, on the

average, 7.4 percent each of the conference cargoes eastbound. But, since 1968, the conference trade has become 94.6 percent containerized. APL and AML started to containerize their fleets much later than Respondents. PFEL committed itself to the LASH concept, largely a breakbulk concept. Through 1974, States still adhered to the breakbulk concept. U.S. Lines entered the trades in 1970, and relief heavily upon military cargoes during the Viet Nam conflict. When the availability of those cargoes was sharply curtailed, United States Lines was required to find cargoes elsewhere. Even so, USL had a 2 percent share in 1974, as compared to its .4 percent share in 1968; and Sea-Land increased its share from .2 percent in 1968 to 13.2 percent in 1970 to 14.7 percent in 1974. All of those factors had an effect upon the share of conference cargoes carried by AML, APL, PFEL, and States.

This proceeding has been miscast as a conflict between U.S. flag carriers and Japanese flag carriers. There is no evidence that Respondents concentrated their competitive activities upon U.S. flag carriers. To the contrary, one U.S. flag carrier, providing a fully containerized, commercially oriented, efficient service, Sea-Land Service, Inc., acquired by 1970 a greater share of the inbound conference cargoes than any other carrier in the conference. As of 1974, Sea-Land had increased that share to 14.7 percent of the conference carryings inbound, still the greatest share.

The record does not contain any evidence that Respondents practiced any deceits, or supplanted economic power for the quality of their service. The record does not contain any evidence that any carrier has been excluded from the Japan-U.S. Pacific Coast trades since the inception of Agreement Nos. 9718, 9731, and 9835.

Consequently, the Commission finds that Respondents entered into these agreements to facilitate the transition from a breakbulk to a fully containerized service, that Respondents have recaptured the share of conference cargoes which Respondents enjoyed prior to commencing the transition, and that the conduct of Respondents pursuant to Agreement Nos. 9718 and 9731 in the period 1968 through 1974 has not been shown to have been unjustly discriminatory or unfair as between carriers.

By the means of Agreement Nos. 9718 and 9731 Respondents have reduced the level of competition among themselves. As such, the agreements run counter to the policies, enunciated in the United States antitrust laws, in favor of free and open competition in the marketplace. It is necessary, therefore, to examine what benefits, if any, these agreements confer upon the public, for the Commission will not approve an agreement if it invades the policies enunciated in the antitrust laws more than is necessary to serve the regulatory purposes of the Shipping Act.

Pursuant to Agreement No. 9718 Japan Line, Kawasaki Kisen Kaisha, Mitsui O.S.K. Lines, and Yamashita-Shinnihon Steamship Company each advertise twice weekly sailings between Oakland and Los Angeles on the one hand and Kobe, Tokyo, Yokohama, and Shimizu on the other, a

level of service deemed competitively necessary by those carriers. That offering of service is accomplished by the use of two vessels by each carrier, a total of eight vessels. Absent Agreement No. 9718, each of those four carriers, in order individually to offer that level of service, would have to employ eight vessels in the trade.

Pursuant to Agreement No. 9731, Nippon Yusen Kaisha and Showa Shipping Co. each advertise weekly sailings between Oakland and Long Beach on the one hand and Kobe, Tokyo, Yokohama, and Shimizu on the other, a level of service deemed competitively necessary by those carriers. That level of service is accomplished by the use of two vessels by each carrier, a total of four vessels. Absent Agreement No. 9731, in order individually to maintain that level of service, each of the carriers would have to employ four vessels in the trade.

Contrary to the argument of Petitioner, this record evidences that the competition among Respondents, although diminished, is still real. Except for Showa Shipping Company, in the years 1968 through 1974, both eastbound and westbound, with rare exception, each Respondent carried more revenue tons of its own cargo on its own ships than it did the cargo of any other single party to the agreements. Each Respondent resists allotting to any of the other Respondents any space on its own vessel beyond the standard uniform allotment. Each Respondent vigorously avoids the use of the containers of any other Respondent for the carriage of its cargo. One Respondent's cargo is carried in the container of another Respondent only when an error is made at the terminal, and cargo is mistakenly placed in the wrong container.

Further, Respondents compete with all other carriers in the trades.

The record shows that the transpacific trades, through 1974, had a significant excess of capacity over cargo offered for carriage. These agreements permit Respondents to offer the level of service which they consider competitively necessary, a determination not unreasonable on this record, with substantially less capacity than would be required for each Respondent to individually offer that level of service. The agreements, therefore, tend to ameliorate the overtonnaging problem in the transpacific trades and tend to keep a high number of common carriers in those trades. Both of those results are beneficial to the public, and outweigh the anticompetitive effects of these agreements, demonstrated on this record, sufficiently to justify the continued implementation of these agreements until August 22, 1977, the date upon which Agreement Nos. 9718 and 9731 will terminate in accordance with the amendments now before the Commission for approval.

Consequently, the Commission finds that Agreement Nos. 9718-3 and 9731-5 are not contrary to the public interest or detrimental to the commerce of the United States.

Petitioner alleged at the outset of this investigation that the subject agreements deprived its members of employment. It alleged that deprivation was effected by depriving the steamship companies which employed

the members of Petitioner of cargo by the unfair method of competition employed by Respondents pursuant to the subject agreements.

Petitioner is a union which represents the cooks, bakers, butchers, pastrymen, dining stewards, storekeepers, waiters, waitresses, bartenders, bedroom stewards, bellmen, tailors, photographers, beauticians, librarians, and telephone operators employed by U.S. flag steamship companies based on the Pacific Coast of the United States. Steamship companies involved in this proceeding which employ Petitioner's members are American Mail Line, American President Line, Pacific Far East Line, States Steamship Company, and, for the years 1968 and 1969, Matson Navigation Company. Matson Navigation Company left the Japan-U.S. Pacific Coast trade in 1970. The reason why that company left the trade is not evidenced in this record.

The number of man days worked by union members has substantially decreased between 1968 and 1974. The extent of that decrease has been estimated at 37.8 percent by Petitioner, and 48 percent by Respondents. The decline in union employment is the result of several factors, including the modernization of the equipment utilized by the steamship companies employing Petitioner's members, the transfer of vessels previously employing Petitioner's members to trades other than the Japan-U.S. Pacific Coast trades, and the decline in the share of conference cargo carried by the steamship companies employing Petitioner's members.

The decline in the share of conference cargo carried by the steamship companies employing Petitioner's members was attributable in large part to the increase in the share carried by Sea-Land, which does not employ Petitioner's members. Further, all seafaring positions on privately owned U.S. flag vessels declined by 57.5 percent between January 1, 1968 and January 1, 1975. This record does not demonstrate that Agreement Nos. 9718, 9731 and 9835 are the predominant cause of the decline in union employment.

Even though the success enjoyed by Respondents has contributed to the decline in union employment, Petitioner has not proven, on this record, that Respondents' agreements have been unjustly discriminatory or unfair as between carriers, so Petitioner has not proven that Respondents' agreements have unfairly deprived Petitioner's members of employment.

Both Petitioner and Respondents have moved the Commission to strike portions of each other's briefs in this proceeding. Respondents wish the Commission to strike those portions of notes 1 and 29 of Petitioner's Reply to Exceptions, wherein Petitioner alleges error on the part of the Presiding Officer for admitting Exhibit 2 into evidence in this proceeding. A reading of those notes indicates that Petitioner merely pointed out that it had no opportunity to cross-examine the author of and the persons referred to in the letter admitted as Exhibit 2, and that Petitioner has excepted to the erroneous ruling of the Presiding Officer. It is proper for Petitioner to point out to the Commission that it had no opportunity to

cross-examine the author of Exhibit 2. Petitioner made that point in its arguments advanced against those proffered by Respondents in Respondents' Exceptions. The fact that Petitioner was unable to cross-examine the author of that Exhibit 2 is a factor for the Commission in determining what weight to give to Exhibit 2. Of course, Petitioner was incorrect in stating that it had excepted to the alleged error of the Presiding Officer in admitting Exhibit 2 over its objections. Notes 1 and 29 to Petitioner's Reply to Exceptions will not be stricken.

Respondents also moved to strike five references in Petitioner's Reply to Exceptions on the grounds that the references are to matters not in evidence.[3] Three of the references are to the record in Docket No. 76–14, one is to the files of the Commission, and one is to the vote of the Japanese Government in UNCTAD regarding the Code of Conduct for Liner Conferences. Petitioner argued in response that the Commission could take official notice of these matters.

Litigants before the Commission are required to limit their arguments to evidence of record in the proceeding to which those arguments are directed. Requests for official notice of some fact should be made at a time early enough to permit other litigants to a proceeding to argue the weight of the facts to be officially noticed.

Petitioner's extra record references in its reply were improper, and its request that the Commission officially notice the records of other proceedings, the files of the Commission, and facts generally known, was too late. Therefore, those references in Petitioner's Reply to Exceptions will be stricken. It is worthy of note that, while those references are stricken from the reply of Petitioner, they are stricken in order to preserve fairness in the proceedings before the Commission. The Commission is aware of the records in other proceedings, and the contents of its files. That knowledge is used by the Commission in determining the persuasiveness of arguments made by litigants to the Commission. That is one of the reasons why cases such as this are determined by an administrative agency. The knowledge of arguments, made in different proceedings, that conflict one with the other, is part of the expertise of the Commission.

Petitioner has also moved to strike references in Respondents' Reply Brief before the Administrative Law Judge and Respondents' Reply to Exceptions.[4] The comments regarding the pleadings of Petitioner apply with equal force to the pleadings of Respondents. The references complained of by Petitioner, except for the references in Respondents' Reply to Exceptions at page 30, note 22, and the first sentence of page 20, note 11, will be stricken. The former reference is an objection by Respondents to the reference by Petitioner, in its exceptions, to the data

[3] The specific references wished stricken are: page 14, note 9; page 21, note 14; page 36, lines 11–15, commencing with "As the Japanese Government . . ."; pages 40–41, commencing with "Yet in the affidavit of . . ."; and page 44, note 34, last sentence.

[4] Reply Brief, page 16, notes 7 and 8; pages 17–18; page 26, note 15; and Reply to Exceptions, page 20, note 11; page 30, note 22; and pages 34–35.

contained in Docket No. 76–14, and the latter is a citation to a Commission decision approving an agreement assertedly similar to those at issue in this proceeding. Those two references are proper, and will not be stricken.

Respondents also filed a motion requesting the Commission to take official notice of an affidavit executed by S. Suzuki, a witness in this proceeding, wherein Mr. Suzuki sets forth selected Trans-Pacific Freight Conference of Japan/Korea cargo statistics for portions of 1968, 1975, and 1976. The Commission will not officially notice the affidavit of a witness in a proceeding, filed at the eleventh hour, which contains excerpts, selected by the witness, from a great mass of statistical data.

Lastly, Petitioner has filed a motion requesting the Commission to order Respondents to show cause why their Exceptions and Reply to Exceptions should not be stricken; that Respondents be ordered to file a memorandum with the Commission stating the substance of each *ex parte* communication made to the Commission regarding this proceeding; and that Petitioner be allowed to reply to such a memorandum. The grounds for Petitioner's motion are an allegation that Respondents have made *ex parte* communications to the Commission regarding this proceeding, either directly or indirectly. Petitioner attached to its motion a document alleged to be a true copy of a telegraphic message sent by the Secretary General of the Council of European and Japanese National Shipowners' Associations (CENSA) to CENSA's Washington representative quoting from a telegraphic message purported to be from the Japanese Shipowners' Association to CENSA, (1) representing that Respondents would appreciate it if CENSA members would cooperate in submitting to the Commission an informal protest of the Initial Decision in this proceeding; (2) representing that the Government of Japan had decided to submit a diplomatic representation; and (3) requesting that the members of CENSA approach their respective governments with the view to having those governments make protest to the Commission via diplomatic channels. The Secretary General of CENSA further reported in that message that,

> . . . opportunity has been taken at luncheon today [July 30, 1976] between Chairman of CENSA and Bakke [Chairman of this Commission] to raise a marker on behalf of CENSA as suggested by Japanese. Bakke fully aware of situation and political implications. However, could, of course, give no commitment as matter is sub judice.

Also attached to Petitioner's motion was a copy of an Aide Memoire from the Governments of Belgium, Denmark, Finland, France, Italy, Japan, the Netherlands, Norway, Sweden, and the United Kingdom, objecting to the Initial Decision in this proceeding insofar as it relied upon the promotion of U.S. flag carriers as a factor in the approval of the agreements at issue here, and insofar as the Initial Decision would require, as a condition of approval of Agreement No. 9718–3, that Respondents reduce the number of vessels operated pursuant to Agreement No. 9718 from eight to six.

Respondents replied in opposition to the motion, and attached affidavits

from the Chairman of CENSA, James Gladstone Payne, and the General Manager, International Affairs Division, of the Japanese Shipowners' Association, Seishiro Miyamoto. Those two affidavits represent that, while the Chairman of CENSA lunched with the Chairman of this Commission on July 30, 1976, that luncheon was arranged on June 12, 1976, that Respondents did not ask the Chairman of CENSA to approach the Chairman of this Commission, and that the Chairman of this Commission declined to discuss Docket No. 75–30 with the Chairman of CENSA as the matter was before the Commission for decision.

In addition to the affidavits referred to above, the Chairman of this Commission, Karl E. Bakke, has informed the Commission that, at a luncheon with the Chairman of CENSA on July 30, 1976, the Chairman of CENSA indicated to the Chairman of this Commission that CENSA was concerned about the Initial Decision in Docket No. 75–30; that the Chairman of this Commission immediately replied to the Chairman of CENSA that he could not discuss the merits of nor give any commitment regarding a docketed proceeding before the Commission; and that the matter was immediately dismissed without any further comment from the Chairman of CENSA.

The Aide Memoire referred to above was transmitted to the Commission by the United States Department of State, as was a similar Aide Memoire from the Government of Japan. Those two documents were placed in the correspondence section of the docket binder for this proceeding, the action required by the Rules of Practice and Procedure of this Commission, 46 C.F.R. 502.170. Those two documents have not been, and are not now, part of the record for decision in this proceeding. Neither the Commission nor any of the Commissioners have received any communications extraneous to the record in this proceeding except as identified above and those identified as communications (1) through (3), below.

Since the Chairman of CENSA did not communicate anything on the merits of this proceeding to the Chairman of this Commission, his discussion with the Chairman of this Commission on July 30, 1976 did not contravene Rule 502.170(b)(1) of the Commission's Rules of Practice and Procedure. The two Aide Memoires referred to above are *ex parte* communications, and received proper disposition at the Commission.

Since this Report completely discloses to Petitioner the substance of each and every representation made to the Commission regarding this case, extraneous to the record, it is not necessary to require Respondents to file a detailed memorandum regarding those representations. Therefore, the second request for relief by Petitioner will be denied.

Because the two Aide Memoires referred to above are part of the public docket file of this proceeding, in accordance with the rules of the Commission, and because the Commission has not relied upon, or given favorable consideration to, those Aide Memoires in deciding this case, and because Petitioner was aware of the July 30, 1976 luncheon between

the Chairman of CENSA and the Chairman of this Commission at the time Petitioner filed the instant motion, it is not necessary that Petitioner be allowed an opportunity to reply to the formal disclosures contained in this Report. Therefore, Petitioner's third request for relief contained in its motion will be denied.

The first item of relief requested by Petitioner in its motion, to wit: that Respondents' Exceptions and Reply to Exceptions be stricken, will also be denied. It is not necessary to decide in this proceeding, relying only on the affidavits filed by Petitioner and Respondents, what part, if any, Respondents, or their counsel, had in causing the two Aide Memoires referred to above to be transmitted to this Commission. If Respondents had caused *ex parte* communications to be made to the Commission regarding this proceeding, the Government in the Sunshine Act, P.L. 94–409, would permit the Commission to disapprove Respondents' agreements, or to strike Respondents' Exceptions and Reply to Exceptions. However, that statute changes the law, and will not be effective until March of 1977. There being no other authority cited to the Commission, Petitioner's motion for an order to show cause will be denied.

In the final hours of the effort to prepare this Report the Commission received:

(1) A letter, dated September 27, 1976, from executives of American Export Line, Inc., American President Line, Lykes Brothers Steamship Company, Inc., Pacific Far East Line, Inc., Sea-Land Service, Inc., States Steamship Company, United States Lines, Inc., and Waterman Steamship Corporation, all U.S. flag carriers not party to this proceeding, urging the Commission to extend its interim approval of Agreement Nos. 9718–3, 9731–5, and 9835–2 to March 6, 1977, so as to permit those carriers to more effectively negotiate with Respondents with a view towards establishing a revenue pool in the transpacific trades.

(2) A letter, dated October 18, 1976, from executives of each of Respondents complaining of the September 27, 1976 letter from the U.S. flag carriers referred to above, and urging the Commission to disregard that letter.

(3) A letter, dated October 22, 1976, from counsel for Petitioner urging that the Commission not continue its interim approval of Respondents' agreements, as urged by the U.S. flag carriers in their September 27, 1976 letter, and, in the alternative, urging the Commission, if it should approve Respondents' agreements on November 1, 1976, to stay the effective date of that order pending the outcome of negotiations regarding a revenue pool in the Pacific.

(4) A document, filed October 26, 1976, from counsel for Respondents entitled "Reply to Petitioner's Requests to Stay Final Approval Pending Negotiation Of A Bilateral Pool Or To Adjudge The Rights Of Nonparties Contingent Upon Reconsideration".

(5) A document, filed October 26, 1976, entitled "Reply to Petitioner's Request To Treat Respondents' Motion Entitled 'Modification Of Objec-

tion Relative To 1975 Data, Etc.' As a Motion to Reopen the Record Under Commission Rule 13(j)".

Communications (1) through (4) are extra-record, unacceptable, an abuse of the administrative process, are rejected by the Commission, and have not been considered by the Commission in arriving at the decision in this proceeding. Communication number (5) is frivolous, approaches abuse of the administrative process, and is rejected.

The Commission ultimately finds and concludes that, on this record: Respondents do not have a monopoly in the Japan-U.S. Pacific Coast trades; Agreement Nos. 9718 and 9731 have not been unjustly discriminatory or unfair as between carriers; Respondents have not unfairly deprived the members of the Marine Cooks and Stewards Union of employment; and Agreement Nos. 9718 and 9731 secure benefits to the public which outweigh the demonstrated anticompetitive effect sufficiently to justify the continuation of those agreements until August 22, 1977. Consequently, Agreements Nos. 9718-3 and 9731-5 will be approved. An appropriate order will be entered.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75–30

AGREEMENTS NOS. 9718–3 AND 9731–5

ORDER

This proceeding having been initiated by the Federal Maritime Commission, and the Commission having fully considered the matter, and having this date made and entered of record a Report containing its findings and conclusions thereon, which Report is hereby referred to and made a part hereof:

IT IS ORDERED, That, pursuant to section 15 of the Shipping Act, 1916, Agreement Nos. 9718–3 and 9731–5 are approved;

IT IS FURTHER ORDERED, That Petitioner's September 30, 1976, "Motion for Consolidation and Request for Oral Argument" is denied;

IT IS FURTHER ORDERED, That Petitioner's September 16, 1976, "Motion for Order to Show Cause and for other Relief" is denied;

IT IS FURTHER ORDERED, That the following references in Petitioner's Reply to Exceptions, filed July 29, 1976, are stricken:

(1) Page 14, note 9;

(2) Page 21, note 14;

(3) Page 36, lines 11–15 commencing with "As the Japanese Government . . .";

(4) Page 40, commencing with "Yet in the affidavit of. . .";

(5) Page 41, lines 1–13; and

(6) Page 44, note 34, last sentence;

and, that, except to the extent herein expressly granted, Respondents' July 29, 1976, "Motion to Strike and for other Relief" is denied;

IT IS FURTHER ORDERED, That the following references in Respondents' Reply Brief before the Administrative Law Judge dated March 24, 1976, are stricken:

(1) Page 16, notes 7 and 8;

(2) Page 17, second paragraph, last sentence, commencing "The Maritime Subsidy Board,. . .";

(3) Page 18, quoted paragraph, commencing "In 1970 the Japanese-flag. . .";

(4) Page 26, note 15, last sentence;
and that the following reference in Respondents' Reply to Exceptions, filed July 28, 1976, is stricken: Page 20, note 11, second and third sentences; and that, except insofar as herein expressly granted, Petitioner's August 2, 1976, "Motion to Strike" is denied; and

IT IS FURTHER ORDERED, That Respondents' October 18, 1976, "Motion To Take Official Notice" is denied.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 76-25

TRANE COMPANY

v.

SOUTH AFRICAN MARINE CORP. (N.Y.)

NOTICE OF ADOPTION OF INITIAL DECISION

November 4, 1976

No exceptions having been filed to the initial decision of the Administrative Law Judge in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on November 4, 1976.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 76-25

TRANE COMPANY

v.

SOUTH AFRICAN MARINE CORP. (N.Y.)

Adopted November 4, 1976

A complaint which fails to name as respondent a common carrier by water or other person subject to the Shipping Act, 1916, or to allege violation of section 18(b)(3) of that Act by a common carrier by water or conference of such carriers, the only persons liable under that law, is jurisdictionally defective and must be dismissed.

The naming of a carrier's agent as respondent in a complaint which alleges a violation of section 18(b)(3) of the Act without naming the carrier-principal involved is jurisdictionally defective regardless of the agent's authority to act on behalf of its principals located overseas.

A complainant in a case seeking reparation for overcharges must show either that it paid the freight or that it has succeeded to the claim by assignment or other legitimate means. The mere fact that the complainant is the owner of the party paying the freight, without more, does not confer standing to seek reparation.

Amendments to complaints to cure non-jurisdictional defects or defects unrelated to the substance and gravamen of the complaint are permitted under the Commission's rules. Substantial changes to complaints which not merely add parties but substitute different and indispensable parties are in reality new complaints.

William Levenstein for complainant.

David A. Brauner for respondent.

INITIAL DECISION OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE[1]

The Original Complaint

By complaint filed and served May 7, 1976, complainant Trane Company alleged that respondent South African Marine Corp. (N.Y.) was paid freight in excess of that provided in respondent's tariff on two shipments of air conditioning equipment allegedly transported by respondent from New York to Capetown, South Africa, in the years 1974 and 1975. Complainant alleged that it had been subjected to the payment of

[1] This decision became the decision of the Commission November 4, 1976.

charges for transportation which were in excess of those lawfully applicable, in violation of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817 (the Act).[2] Complainant sought reparation in the sum of $1,989.07 or such other proper sum together with any other appropriate order warranted in the premises.

The complaint alleged that the Trane Company is a company incorporated in the State of Wisconsin and located in La Crosse, Wisconsin, whose principal business is the marketing of air conditioning and refrigeration equipment. Complainant furthermore alleged that respondent is a "common carrier by water engaged in the transportation of cargos (sic) between the United States and South and East Africa." Complainant furthermore alleged that "[a]t the time of the shipments here involved, respondent was a member of the United States/South and East Africa Conference and a party to that conference's tariffs."

The facts concerning the two shipments which gave rise to this controversy are as follows. Under bill of lading No. 128, dated June 21, 1974, there occurred a shipment described on the bill of lading as "98 Bxs. Air Conditioning Machinery" weighing 40,431 pounds which was carried from New York to Capetown on the vessel *S.A. Nederburg*. For this shipment payment was made on the basis of a rate plus surcharge published in the Conference tariff applicable to "Machinery, Air Conditioning" amounting to $3,153.16.[3] Complainant alleged that the shipment actually consisted of 98 boxes of "copper tube" and should have been charged the commodity rate for that item under the tariff, which, according to complainant's calculation, would have required only $2,789 in freight. Therefore, complainant claimed an overcharge in the amount of $364.16 on this shipment ($3,153.16 less $2,789). This calculation, as corrected, however, should be $364.51.[4]

On the second shipment, under bill of lading No. 238, dated February 28, 1975, the shipment was described as "50 Bxs. Air Conditioning Machinery (Copper Tube for the Local Manufacture of Trane Heating and Cooling Soils, (sic) Not Domestic)" weighing 20,339 pounds from New York to Capetown on the vessel *Aegis Faith*. Payment was made on the basis of the published rate plus two surcharges applicable to

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[2] Section 18(b)(3) provides in pertinent part that:

No common carrier by water in foreign commerce . . . shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time. . . .

[3] The rate charged was $109 per 40 cubic feet plus a surcharge of $17 for 40 cu. ft. See South and East Africa Conference, South Bound Freight Tariff No. 1, F.M.C. No. 12, 10th revised page 276, Item No. 2130, effective March 5, 1974. At 1001 cu. ft. shown on the bill of lading for the shipment plus the surcharge the total freight amounts to $3,153.16 ($2,727.73 plus $425.43).

[4] The rate for "copper tube" was $137.50 per weight ton (2,240 lbs.). Conference tariff, cited above, fourth revised page 186, Item No. 930, effective March 5, 1974. At 40,431 lbs. shown on the bill of lading for the shipment plus the surcharge ($17 per 2,240 lbs.) the total freight would amount to $2,788.65. ($2,481.81 plus $306.84). Therefore, the overcharge would be $364.51 ($3,153.16 less $2,788.65).

"Machinery, Air Conditioning," amounting to $3,575.39.[5] Complainant alleged that the shipment actually consisted of 50 boxes of "copper tube" and should have been rated as such in accordance with the specific commodity rate published for that item in the tariff. If so, the freight would have been only $1,950.48.[6] Therefore, complainant claims an overcharge in the amount of $1,624.91 ($3,575.39 less $1,950.48).

The total overcharge for the two shipments alleged by complainant amounted to $1,989.07 ($364.16 plus $1,624.91). As corrected, the amount would be $1,989.42 ($364.51 plus $1,624.91).

Complainant requested with respondent's subsequent concurrence that this controversy be decided under the Commission's shortened procedures as provided by Rule 11, 46 CFR 502.181 et seq, that is, on the basis of memoranda of facts and arguments submitted in writing, without oral hearing. In support of its claims that both shipments consisted solely of copper tubes, complainant submitted for the first shipment (bill of lading No. 128) a copy of the original invoice and the pertinent export declaration in addition to the bill of lading itself. For the second shipment (bill of lading No. 238) complainant submitted a copy of Trane's export packing tally in addition to the bill of lading.

Respondent's Original Answering Memorandum

In its original answering memorandum, respondent did not dispute complainant's allegations regarding the nature of complainant's business nor the fact that the shipments were made and billed as complainant alleged nor even that the shipments consisted of copper tubes. Nor did respondent dispute complainant's allegation that respondent South African Marine Corporation (N.Y.) was a common carrier by water, a member of the United States/South and East Africa Conference, and a party to that conference's tariff. Respondent made no mention of the fact that complainant did not establish that complainant had paid the freight although the bills of lading themselves suggested that the consignee, not the shipper-complainant had paid.[7] Nor did respondent challenge the allegation that "respondent carried complainant's shipment" in both instances.[8]

[5] The rate charged was $125.25 per 40 cubic feet plus a $17 per 40 cubic foot surcharge and a 25 percent surcharge applied to the base rate. See United States/South and East Africa Conference, South Bound Freight Tariff No. 2, F.M.C. No. 3, original page 237, Item No. 2130, effective January 1, 1975. At 824 cubic feet shown on the bill of lading, the total freight amounts to $3,575.39.

[6] The rate for "copper tube" was $158.25 per 2,240 lbs. plus two surcharges ($17 per 2,240 lbs. and 25 percent of the base rate). See Conference tariff, cited in previous footnote, original page 174, Item No. 930, effective January 1, 1975. At 20,339 lbs. shown on the bill of lading, the total freight amounts to $1,950.48.

[7] In both shipments, the complaint alleged that "respondent billed and was paid charges . . ." without specifying who paid the charges. Further on, the complaint alleged that "complainant has been subjected to the payment of charges . . ." (Paragraph IV). The bills of lading submitted with the complaint, however, contain the notation "ocean freight collect," which suggests that the consignee in South Africa paid the freight rather than the shipper-complainant located in the United States. Subsequently, it was asserted with the filing of an amended complaint that the consignee did indeed pay the freight.

[8] Respondent's defenses consisted of a variety of arguments relating to tariff rules barring claims or requiring

The Amended Complaint

Although Rule 11 procedures are designed to enable the presiding judge to issue a decision on the basis of pleadings and supporting factual memoranda and materials, my initial examination of these materials revealed obvious deficiencies which inexplicably escaped the notice of the parties. Accordingly, I conducted a special conference with the parties in order to explain these deficiencies and discrepancies and allow the parties an opportunity to remedy the situation. Since one of the deficiencies involved a jurisdictional-type problem which might well have barred any award of reparation, the chief beneficiary of this conference was obviously complainant.

The problem of a jurisdictional nature concerned the failure of the original complaint to establish that complainant had paid the freight or had otherwise validly succeeded to the claim. This goes to the issue of standing to recover reparation, although not to standing to file a complaint not seeking reparation. See *Ace Machinery Company v. Hapag-Lloyd A G*, Docket No. 76-5, Order Denying Motion to Vacate, August 4, 1976, pp. 6, 7; *Colgate Palmolive Co. v. Grace Lines, Inc.*, 11 SRR 982 (1970); *Isthmian S.S. Co. v. United States*, 53 F. 2d 251, 253 (S.D.N.Y. 1931); *Ocean Freight Consultants, Inc. v. The Bank Line Ltd.*, 9 F.M.C. 211 (1966).[9]

There were additional problems and discrepancies in the materials submitted however. For example, regarding the first shipment, the description of the commodity shipped differed as between the invoice and the export declaration, and weight and measurement figures on the export declaration did not correspond with such figures on the bill of lading. Furthermore, regarding the second shipment, complainant furnished no export declaration which might have explained the discrepancy between the bill of lading and export packing tally descriptions. See Notice of Rulings Made During Special Conference, cited above, pp. 2, 3. There

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adherence to bill of lading descreiptions, shipper's negligence and unwarranted attempt to vary the terms of a contract of carriage, encouragement of continued shipper negligence and of an entire industry processing small overcharge claims, excessive costs both to carriers and the Commission to hear and determine these cases, and unfairness to the carrier who is unable to determine what moved so long after the fact. Complainant's original reply to these arguments cited decisions invalidating the tariff rules cited by respondent and characterized the remainder of respondent's arguments as constituting a "clear demonstration of the arrogance with which this carrier approaches over-charge claims." Complainant also argued that the bill of lading was the carrier's own document required to be issued under the Harter Act (46 U.S.C. 193), miscited by complainant as "49 U.S.C.," and that the bill of lading on the second shipment itself shows that copper tubes were shipped, as complainant alleged.

[9] It has long been recognized, as the cases cited show, that "any person" may file a complaint under section 22 of the Act whether or not such person has suffered injury. However, to seek reparation a person must show injury and proof of pecuniary loss. *Oakland Motor Car Co. v. Great Lakes Transit Corp.*, 1 U.S.S.B.B. 308, 310 (1934), *West Indies Fruit Co. v. Flota Mercante Grancolombiana*, 7 F.M.C. 66, 70 (1962). Also the complainant must show that it has suffered real damage. *Ballmill Lumber & Sales Corp. v. The Port of New York Authority*, 11 F.M.C. 494, 510-11 (1968). In a claim for refund of overcharges such as in this case, the complainant must show that he has paid the freight or has succeeded to the claim in a valid fashion such as by assignment. *Ocean Freight Consultants, Inc. v. The Bank Line Ltd.*, cited above, 9 F.M.C. at pp. 212-213; 215-216. No authorities have been cited to me holding that a parent corporation, without more, has standing to seek recovery of damages suffered by its wholly owned subsidiary corporation, as the original parent corporate complainant seems to believe. One wonders, would the parent also be willing to stand trial for its wholly owned subsidiary corporation if that subsidiary were accused of violating the law and would the parent be willing to suffer the penalties required by law on behalf of its subsidiary?

were also minor arithmetic errors in computation of the alleged overcharge, as discussed above.[10]

As a result of the special conference, I granted complainant leave to file an amended complaint naming the real party in interest as complainant and to explain the various discrepancies discussed above. In so doing, I overruled respondent's objections that complainant had submitted his case and was not entitled to further opportunity to fortify and clarify it. I explained my reasons and cited appropriate authorities for these rulings. See Notice of Rulings Made During Special Conference, cited above, pp. 4, 5.[11]

Pursuant to these rulings, an amended complaint was filed and served on September 2, 1976, in the name of Trane Southern Africa (Pty) Ltd. as complainant. This time complainant seeks $1,989.04 in reparation instead of $1,989.07 requested in the original complaint. However, as in the first complaint, there are again errors in computation.[12]

The amended complaint alleges that complainant Trane Southern Africa (Pty) Ltd. is a corporation organized under the laws of South Africa located in Johannesburg, South Africa, and that it is a wholly owned subsidiary of the Trane Company of La Crosse, Wisconsin (the original complainant). In an attached memorandum of facts it is stated that Trane Southern Africa was the consignee of the two shipments involved herein and "paid respondent the ocean freight charges it billed." In addition to the export declaration and invoice originally submitted, complainant has now submitted an export packing tally as well as other materials. For the second shipment, in addition to the export packing tally and bill of lading originally submitted, complainant has submitted the pertinent export declaration, the invoice and declaration of value, an affidavit of the traffic manager of the shipper (Trane Company) and a notarized certificate by the same man stating that the export declaration had listed an incorrect

[10] There was in addition a typographical error in the complaint with regard to the second shipment. This related to the listing of a "$25" surcharge. The correct entry should have been "25 percent" surcharge.

[11] In the rulings cited, I acknowledged that there comes a time when the record in an administrative proceeding must be closed and reopening can no longer be tolerated, citing *Flota Mercante Grancolombiana v. F.M.C.*, 373 F. 2d 674, 679 (D.C. Cir. 1967) and *I.C.C. v. Jersey City*, 322 U.S. 503, 514-15 (1943). However, both this Commission and the courts have stated that they expect trial judges to help ascertain the truth and not merely sit by passively calling balls and strikes. I cited numerous cases for this proposition, such as, *Madeplac S.A. Industria de Madeiras v. Figueiredo Navegaco, S.A. a/k/a Frota Amazonica, S.A.*, Docket No. 74-45, Order on Remand, July 20, 1976, *European Trade Specialists, Inc. et al. v. Prudential-Grace Lines, Inc. et al.*, Docket No. 74-8, May 28, 1976, p. 24, *Scenic Hudson Preservation Conf. v. Federal Power Commission*, 354 F. 2d 608, 620 (2d Cir. 1965), *Isbrandtsen Co. v. United States*, 96 F. Supp. 883, 892 (S.D.N.Y. 1951).

[12] As I pointed out earlier, for the first shipment the correct computation for overcharge would be $364.51, not $364.16, which latter amount is shown on both the original and amended complaints. For the second shipment, the correct computation for overcharge would be $1,624.91, not $1,624.88 shown on the amended complaint. The original complaint had actually shown the correct calculation of the overcharge for this shipment ($3,575.39 less $1,950.48; original complaint, p. 3). The correct total overcharge for both shipments would be $1,989.42, not $1,989.07 shown in the original complaint nor $1,989.04 in the amended complaint. ($364.51 plus $1,624.91). Although minor errors, the continued appearance in the amended complaint of such mistakes is not commendable especially since some of these mistakes are obvious on the face of the complaint. For example, on page three of the amended complaint where the allegedly proper charge for the second shipment is calculated, the figures $1,439.90, $359.25, and $154.36, are shown as totalling $1,950.51 (instead of $1,953.51) and 25% of $1,439.90 is shown as $359.25 (instead of $359.98). In a case arising under section 18(b)(3) of the Act it is important to make sure that a carrier charges no more or less than what is specified in its tariffs and practitioners before the Commission ought to exercise some care before submitting or agreeing to calculations which may form the basis for an award of reparation.

Schedule B number. All of these materials, complainant alleges, support its contention that copper tubes were the sole commodity involved in the two shipments at issue.

Respondent's Answering Memorandum to Amended Complaint

To a large extent respondent repeats its earlier arguments regarding its reliance on tariff rules to deny the claims as well as the shipper's negligence and attempts to vary the terms of its contract, costs and burdens on carriers and the Commission to process and hear such claims, etc. Again respondent does not deny that the shipments were made and billed as complainant describes them and has no comment to make regarding the complainant's allegations that respondent is a common carrier by water, a member of the United States/South and East Africa Conference, and a party to that conference's tariffs. Respondent does argue, however, that the original complaint should have been dismissed for lack of standing of the original complainant to recover reparation since, as is now acknowledged, the original complainant did not pay the freight. At best, argues respondent, the amended complaint should be treated as a new proceeding, in which case the first claim involving a shipment occurring in June 1974, should be dismissed as having arisen beyond the two-year period of limitations contained in section 22 of the Act. Respondent also argues on the merits of the controversy that the supporting evidentiary materials are in effect unreliable and do not satisfy the heavy burden of proof that complainants in such cases as this have.

Complainant's reply memorandum again cites Commission decisions denying the validity of defenses based upon time-based tariff rules and permitting shippers to show what actually moved regardless of bill of lading descriptions. Complainant again contends that the bill of lading is the carrier's document required by the Harter Act (again miscited by complainant as 49 U.S.C. 193, instead of 46 U.S.C. 193). Complainant furthermore disputes respondent's contention that the Commission's rules do not permit the filing of amended complaints, citing "Rules (j) 502 C.F.R. 502.70." (Amended Complaint, p. 2).[13] Complainant disputes respondent's contention that the original complaint should have been dismissed for lack of standing on the ground that as the sole owner of the corporate consignee who paid the freight, the original complainant did indeed have standing which could have been shown if I had not permitted the filing of an amended complaint.

Although, as I noted previously, it appears to me that a person who has not paid the freight or who is not a valid assignee of a claim has no standing to recover reparation although he may file a complaint alleging

[13] The correct citation should be to Rule 5(j), 46 CFR 502.70. This rule provides in pertinent part:

Amendments or supplements to any pleadings will be permitted or rejected in the discretion of the Commission if the case has not been assigned to a presiding officer for hearing, otherwise in the discretion of the officer designated to conduct the hearing. . . . The presiding officer may direct a party to state his case more fully and in more detail by way of amendment.

violations of the Act, in view of the fatal flaw in both the original and amended complaints, both of which, it now appears, fail to name a common carrier as respondent, it is unnecessary to decide the issue of complainants' respective standings. In short, it appears that the original complaint was filed by a shipper-complainant having no standing to be awarded reparation against a carrier's agent with no cognizable status under section 18(b)(3) or 22 of the Act, thus, as far as reparation claims under the Act are concerned, the controversy involved nobody vs. nobody. The amended complaint, while appearing to give standing to a consignee-complainant who at least paid the freight, again names a carrier's agent as respondent, in other words, as far as reparation claims under the Act are concerned, it involves somebody vs. nobody. I now elaborate.

DISCUSSION

The critical issue for decision which will determine whether I can consider the merits of this controversy and determine if reparation should be awarded in any amount is whether the failure of a complaint to allege that a common carrier by water subject to the jurisdiction of the Act has violated section 18(b)(3) of the Act is a basic defeat which deprives the Commission of jurisdiction to determine the controversy. A subsidiary issue is whether the naming of an agent of such common carrier suffices to confer jurisdiction. For the following reasons, I must conclude that the complaint is jurisdictionally defective and that both the original and amended complaints should have been dismissed at the outset for that reason.

The basic authority of the Commission to entertain complaints stems from section 22 of the Act, which states in pertinent part:

> That any person may file with the Commission a sworn complaint setting forth any violation of this Act by a *common carrier by water, or other person subject to this Act*, and asking reparation for the injury, if any, caused thereby. The Commission shall furnish a copy of the complaint to such carrier or other person. . . . 46 U.S.C. 821. (Emphasis added.)

Both the original and amended complaints name "South African Marine Corp. (N.Y.)" as respondent and allege that this company is a common carrier by water, a member of a named Conference of such carriers, and even a party to that Conference's tariffs. In both the original and amended answering memoranda, the named respondent does not dispute these allegations. The only problem of a jurisdictional nature that appeared obvious from the pleadings and materials submitted, as I have discussed, was that the shipper-complainant named in the original complaint did not appear to have paid the freight and therefore lacked standing to seek reparation. This problem was cured by permitting the filing of an amended complaint in which it was confirmed that the original shipper-complainant had not paid the freight, which was paid by the consignee in whose name

the amended complaint was now filed. There was no further indication of any other jurisdictional defect and considering the fact that respondent did not dispute the erroneous allegations regarding the status of the named respondent, I had no cause to question the status of "South African Marine Corp. (N.Y.)." It was only after complainant's final reply was filed that I became aware that this named respondent is not a common carrier at all but the general agent of three common carriers, to wit, South African Marine Corporation Ltd., Springbok Line, Ltd., and Springbok Shipping Company, Ltd.[14]

Not only, therefore, do both complaints not name or allege a violation by a common carrier as required by section 22 of the Act but they ask for a finding of violation of section 18(b)(3) of the Act which by its terms is limited to common carriers or conferences of such carriers, stating in pertinent part:

> No *common carrier by water in foreign commerce or conference of such carriers* shall charge or demand or collect a greater or less or different compensation for the transportation of property . . . than the rates and charges which are specified in *its tariffs* on file with the Commission. . . . 46 U.S.C. 817. (Emphasis added.)

A carrier's agent such as the named respondent in both complaints does not transport property, is not a party to a Conference agreement consisting of carriers, and has no tariff of its own. It is the carrier principal, not the agent, that does these things and stands liable for violations of section 18(b)(3) or for any section of the Act for which standards of conduct are imposed on such carriers. There is no doctrine that the carrier may stand aloof while the agent assumes full responsibility for violation of the carrier's duties under the Act. See *Hellenic Lines, Ltd.—Section 16 (First) and 17 Violations*, 7 F.M.C. 673 (1964), *Cont. Distrib'g Co., Inc. v. Cia. Nacional De Nav.*, 2 U.S.M.C. 724, 725 (1945).[15] Indeed, the very bills of lading submitted in this case state on their face a clear disclaimer by South African Marine Corporation (N.Y.),

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[14] These facts were stipulated by the parties in *Caterpillar Overseas, S.A. v. South African Marine Corp. (N.Y.)*, Docket No. 76-39, in a document filed in that case signed by counsel for the parties on September 22 and 23, 1976. The names of the true carriers are also shown on the pertinent tariffs and on the back of the bills of lading issued on behalf of these carriers by South African Marine Corporation (N.Y.) as agents. These facts are therefore officially noticeable. Rule 13(f), 46 CFR 502.226. The bills of lading submitted in the present case were xerox copies of one side only which did not show the names of the carriers on the back side. The front page of the bill of lading, however, does contain the notation "Ship operated for account of:" and shows a barely legible group of stamped letters and numbers which on close inspection shows that the first shipment (bill of lading No. 128) was carried by "carrier no. 2" (Springbok Line, Ltd., according to the back side of the bills of lading filed in Docket No. 76-39). The second shipment (bill of lading No. 238) was carried by "carrier no. 1" (South African Marine Corporation, Ltd., according to the same source). South African Marine Corporation, Ltd., the carrier, is not to be confused with South African Marine Corporation (N.Y.), the agent and named respondent in the present case. See Docket No. 76-39, cited above, Initial Decision, September 30, 1976.

Since counsel for complainant who signed the abovementioned stipulation is also counsel for complainant in the present case and the same firm represents the named respondent in both cases but these facts regarding the status of the named respondent was not brought to my attention by counsel, apparently counsel foresaw no legal significance to these facts. Otherwise, I presume they would have brought such facts to my attention.

[15] In the *Hellenic* case, the carrier unsuccessfully tried to avoid liability for violations of sections 16 First and 17 of the Act by arguing that its agent in Djibouti, French Somaliland, had been responsible. The carrier, of course, was named as respondent. In *Cont. Distrib'g Co., Inc.*, the Commission flatly held that two companies named as respondents were "agents and, as such, are not subject to the act." 2 U.S.M.C. at p. 725.

the agent named as respondent in this case, of any carrier liabilities, the agent stating:

> Neither South African Marine Corporation (N.Y.) nor any other person, firm or corporation other than the carrier, whether or not the name is stated elsewhere herein, assumes any of the duties, responsibilities and liabilities stated herein as being those of the carrier.

Whatever may be the authority of the general agent named as respondent in this case to act on behalf of its principals, therefore, I cannot find such an agent in violation of a statute which names only carriers and conferences of carriers nor can I find a carrier in violation of such statute who has not been named in the complaint and, indeed, has been nowhere identified in any of the pleadings or materials submitted in the case. Whatever the consequences of dismissal of the subject complaints, the defect is basic and jurisdictional and justifies dismissal.

The Reason for Dismissal Rather than Further Amendment

I am aware of the fact that the Commission is an administrative agency and not a court and that the Commission has recognized that it "ought not to be hampered in its proceedings by the hard and fast rules as to pleading and practice which govern courts of law . . . and that inquiries should not be too narrowly constrained by technicalities." *Oakland Motor Car Co. v. Great Lakes Transit Corp.*, 1 U.S.S.B.B. 308, 311 (1934). In this spirit the Commission has permitted a complainant to cure a defective complaint which failed to contain the seal of a notary public to attached affidavits without being barred by the two-year period of limitations in section 22 and even permitted complainants to cure a defective complaint which had not even been verified or sworn to when initially filed so as not to lose their rights under the two-year period of limitations. *Oakland Motor Car Co. v. Great Lakes Transit Corp.*, cited above; *Gillen's Sons Lighterage v. American Stevedores*, 12 F.M.C. 325, 331, note 6 (1969), referring to the Examiner's rulings reported in 10 SRR 195 (1968).[16] The Commission has also held that a complaint which was originally defective because it chose an incorrect remedy but correctly stated the substance or gravamen of the claim could be cured subsequently even if the period of limitations had meanwhile expired. *Heterochemical Corp. v. Port Line*,

[16] In the rulings referred to, the Examiner had held that the requirement that a complaint be verified and sworn to as provided by section 22 of the Act was not a jurisdictional one in the strict sense but a defect which could be cured subsequently even if the two-year period of limitations had run in the meantime. He distinguished this type of requirement as being designed to protect the Commission from pursuing reckless or false claims as distinct from non-waivable jurisdictional requirements such as the two-year period for filing which extinguishes claims and is designed to "cut off liability for stale claims." 10 SRR at p. 198. See also *U.S. Borax & Chem. Corp. v. Pac. Coast European Conf.*, 11 F.M.C. 451, 471–72 (1968), *Aleutian Homes, Inc. v. Coastwise Line*, 5 F.M.B. 602, 612 (1959). Curiously, his ruling is contrary to that of the Commission's predecessor in *Reliance Motor Car Co. v. Great Lakes Transit Corp.*, 1 U.S.M.C. 794 (1938), which held that the "sworn-to" requirement is jurisdictional and cannot be cured subsequently if the statutory two-year period has expired in the meantime. The Examiner recognized his departure from *Reliance Motor* and suggested "that this Commission is not bound by its predecessor's decision." 10 SRR at p. 197. He cited numerous authorities for his ruling. In adopting the Examiner's decision, the Commission made no mention of this ruling, which was referred to in a footnote in the Examiner's decision. In any event, there was no dispute that the two-year period of limitations is jurisdictional and the issues did not involve the failure to name an indispensable jurisdictional party.

Ltd., 12 SRR 223 (1971). In all of the above cases, however, the respondents named in the complaints were carriers or persons subject to the Act capable of violating the various provisions of that Act involved. It is one thing to permit an amendment to a complaint which merely affixes a notary's seal, adds a supporting sworn statement, or alters the type of relief requested without changing the essential nature of the cause of action or the respondents involved. It is quite something else to name a totally different respondent. The latter "amendment," in my opinion, constitutes a new proceeding and goes beyond the type of amendments permitted by Rule 5(j), 46 CFR 502.70. Cf. the recent changes to the Commission's rules which now authorize presiding judges to "amend" Commission orders of investigation but which clearly state that such authority cannot be used to add parties to the proceeding. *Rules of Practice and Procedure*, Docket No. 76-27, 16 SRR 1387, 1388 (1976), amending Rule 10(g), 46 CFR 502.147(a). Cf. also *Carolina Cotton & Woolen Mills Co. v. Southern Ry. Co.*, 195 I.C.C. 654, 658 (1933), where the I.C.C. held that a complaint which failed to name as complainant one who had paid the charges or had a valid assignment of the claim was improperly filed and not "cognizable" by that Commission.[17]

For these reasons as well as those discussed above, I conclude that dismissal is the appropriate action rather than leave to file a further amended complaint.

ULTIMATE CONCLUSION

The original complaint filed in this proceeding alleging an overcharge in violation of section 18(b)(3) of the Act failed to establish even with the supporting documentation that complainant had paid the freight or had validly succeeded to the claim, prerequisites to the seeking of reparation. The amended complaint substituted a new complainant which, it was asserted, had paid the freight. In both complaints, however, neither a common carrier by water or other person subject to the Act was named as respondent, the named respondent being the agent of three unnamed carriers. This failure to name a jurisdictionally indispensable party is fatally defective and requires dismissal of both complaints, regardless of the authority of the carrier's general agent to act on behalf of its

[17] Since both the original and amended complaints in this case must be dismissed because of failure to name an indispensable jurisdictional party as respondent, my earlier ruling permitting the filing of an amended complaint is academic. However, since the amended complaint did not merely explain the status of complainant or confirm its standing to seek reparation but rather replaced the complainant with a wholly new party it now appears to me that the use of Rule 5(j) was inappropriate. In cases in which new complainants are named who have received valid assignments of claims, the corrected complaints are treated as "new or supplemental" at the time of filing the corrected complaint and if the statute of limitations has meanwhile expired, the new complaint may be time barred. Cf. *Carolina Cotton & Woolen Mills Co. v. Southern Ry. Co.*, cited above, where the I.C.C. treated the original complaint in which complainant had neither paid the freight nor held an assignment of the claim as not "cognizable." 195 I.C.C. at pp. 658, 659. In *Ocean Freight Consultants, Inc. v. The Bank Line Ltd.*, 5 SRR 609 (1964) and 829 (1965) this Commission similarly treated the filing of an assignment as starting a new complaint even though there was no change in complainants. Even in *Chr. Salvesen & Co. Ltd. v. West Michigan D. & M. Corp.*, 9 SRR 1154 (1968), where the Examiner seems to go the other way, the amended complaint essentially only clarified the status of the originally named comlainant-manager who had shown that he had authority to prosecute the claim at the very beginning on behalf of the owner of the vessel involved.

principals. Furthermore, the mere fact that a complainant is the sole owner of a subsidiary corporation which paid the freight is not enough to confer standing to recover reparation.

Amendments to complaints are liberally permitted under the Commission's rules so as to protect rights which might expire under the two-year period of limitations contained in section 22 of the Act. Amendments which have corrected defects such as omitting signatures, seals, or sworn statements or selecting incorrect remedies or measures of damages have been permitted by the Commission in the interest of justice and in the spirit of administrative flexibility. However, amendments which do not merely add parties having a community of interest with an original complainant to a suit properly brought but substitute different parties, especially when such parties are jurisdictionally indispensable, are not merely clarifying amendments but new complaints which should be so treated despite the possible effects of the period of limitations contained in section 22 of the Act. Cf. *Kam Koon Wan v. E.E. Black, Limited*, 75 F. Supp. 553, 564–65 (D. Hawaii 1948), affirmed, 188 F. 2d 558, cert. denied 342 U.S. 826.

Accordingly, the subject complaints are hereby dismissed.

(S) NORMAN D. KLINE,
Administrative Law Judge.

WASHINGTON, D.C.,
October 7, 1976.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 330(I)

CUMMINS ENGINE CO., INC.

v.

UNITED STATES LINES, INC.

NOTICE OF ADOPTION

March 10, 1976

The Commission by notice served March 10, 1976, indicated it had determined to review the initial decision of the settlement officer in this proceeding served July 22, 1976. Upon completion of our review we have determined that the decision of the settlement officer should be adopted as the decision of the Commission.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 330 (I)

CUMMINS ENGINE CO., INC.

v.

UNITED STATES LINES, INC.

Adopted March 10, 1976

Reparation granted.

DECISION OF CAREY E. BRADY, SETTLEMENT OFFICER[1]

Cummins Engine Company, Inc. claims $551.08 as reparation from United States Lines, Inc. (USL), for alleged overcharges on three shipments which moved on USL's vessels during March 1973. The first shipment moved on USL's bill of lading No. 631–7301, dated March 23, 1973, from Yokahama, Japan to New York, aboard the American Liberty. The second shipment moved on USL's bill of lading No. 631–7304, dated March 3, 1973, from Yokohama, Japan to New York aboard the American Archer.

The first and second shipments were described on each respective bill of lading as "50 Cases Connecting Rod Assembly". The Bureau of Customs Special Customs Invoice Form 5515 and the shipper's invoice both described the respective cargoes as "50 Cases Connecting Rod Assembly". Bureau of Customs Consumption Entry Form 7501 described the cargoes as "50 Cases Diesel Engine Parts".

Respondent rated the shipments on the basis of $67.25 per 2,000 lbs., which was the applicable rate for "Automobile, Bus and Truck Parts, viz: Other Parts", according to 5320–25 of the respondent's tariff in effect at that time.[2] Total charges on the first shipment were assessed in the amount of $568.06, which included currency surcharges and CFS charge. Total charges were assessed on the second shipment in the amount of $458.39, which included a CY discount of 5%.

The third shipment was described on the bill of lading as "36 Pkgs. 'K engine' component sets". Bureau of Customs Special Customs Invoice

[1] This decision became the decision of the Commission on March 10, 1976.

[2] Japan-Atlantic & Gulf Freight Conference Tariff No. 34, FMC-3, 14th Revised Page No. 234.

Form 5515 described the cargo as "36 Pkgs 'K engine' component sets". The shipper's invoice and packing list described the cargo as "36 Pkgs. 'K engine' component sets" and details the commodities to be: Head Assembly, Gear Cover, Camshafts, Cylinder Block and Crankshaft. Bureau of Customs Consumption Entry Form 7501 described the cargo as "36 Pkgs. Diesel Engine Parts".

Respondent rated the shipment on the same basis as the first two shipments resulting in total charges being assessed in the amount of $1,578.53, including a 5% CY discount.

Complainant contends that the respondent misclassified the shipment and should have applied the rate of $53.50 per 2,000 lbs., the rate for "Automobile, Bus and Truck Parts, viz: Cylinder Block Assemblies, with or without Crankshafts" as per Item 5320–7.[3] Such a classification would have saved the complainant a combined total of $551.08 on all shipments. Complainant argues in support of its position that the Cylinder Block Assemblies description is broad enough and ambiguous enough to cover any type of a part that goes into, or is attached to, a cyclinder block. Further, that description is published without qualification other than with or without crankshafts.

Respondent maintains that in classifying the cargo, it relied on the description on the three bills of lading, namely; Connecting Rod Assembly, and K engine component sets, respectively. Respondent further states that it "is regretted that the shipper did not identify his shipments for what they actually were; namely: 'parts for engine block assembly'. As far as we, here, are concerned, we have no objection to this rate being granted but unfortunately, we feel the final decision, because of the actual description placed on the bills of lading may rest with the Conference Headquarters in Tokyo." The record indicates the Conference does not interpret the cargo shipped to fall in the category of cylinder block assemblies.

The test the Commission applies on claims of reparation involving alleged error of a commodity tariff classification is what the complainant can prove, based on all the evidence as to what was actually shipped, even if the actual shipment differed from the bill of lading description.[4] However, the complainant has a heavy burden of proof once the shipment has left the custody of the carrier.[5]

From the documentation of record, it is clear the commodities actually shipped were unquestionably parts for engines, i.e. connecting rod assembly, head assembly, gear cover, camshaft, cylinder block and crankshaft. The Conference tariff discloses no specific commodity rate for connecting rod assembly, head assembly, gear cover or camshaft.

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[3] Ibid.

[4] Western Publishing Company, Incorporated v. Hapag-Lloyd A.G., informal docket No. 283(I) Commission Order served May 4, 1972.

[5] Colgate Palmolive Co. v. United Fruit Co., informal docket No. 115(I) Commission Order served September 30, 1970.

Cylinder blocks and crankshafts are named in the disputed tariff item 5320–7.

Complainant's contention that the commodities shipped are parts of a cylinder block assembly appears to be a reasonable one.

Webster's Third New International Dictionary of the English Language, Unabridged (1964), defines an assembly as:

"5a: the act or process of building up a complete unit (as a motor vehicle), using parts already in themselves finished manufacture products. b: a collection of parts so assembled as to form a complete machine, structure or unit of a machine."

Webster's New World Dictionary, College Edition (1968) defines assembly as:

"4. a fitting together of parts to make a whole, as in making automobiles. . . .
5. the parts to be thus fitted together."

From the above definitions of an assembly, it can reasonably be concluded that cylinder block assemblies include those parts of an engine that go into or are attached to the cylinder block to make up the end product which can be reasonably considered directly related to the construction of an engine. An exploded view of an engine readily shows a connecting rod, gear cover and camshaft go into, or are directly attached to, the cylinder block.

Tariff Item No. 5320–07 is not at all specific as to what component parts constitute a cylinder block assembly, aside from indicating such assembly may be with or without crankshafts. Such a description is so unclear that reasonable men could differ on its application. Where an ambiguity does exist, then the tariff must be construed in such a manner so as to resolve such ambiguity in favor of the shipper.[6]

In addition, the Commission has long recognized that tariff terms should be interpreted reasonably. In National Cable and Metal Co. v. American Hawaii S.S. Co., 2 U.S.M.C. 471 (1941),[7] the Commission's predecessor stated:

"In interpreting a tariff, the terms used must be taken in the sense in which they are generally understood and accepted commercially, and neither carriers nor shippers should be permitted to urge, for their own purposes, a strained and unnatural construction. Tariffs are to be interpreted according to the *reasonable* construction of their language; neither to the intent of the framers, nor the practice of the carrier controls, for the shipper cannot be charged with knowledge of such intent or with carrier's canons of instruction. *A proper test is whether the article may be reasonably identified by the tariff description*". (underlining supplied)

Since connecting rod assembly, head assembly, gear cover and camshaft are not specifically excluded by Item 5320–7, it can only be concluded that they reasonably fall within the general description of cylinder block assemblies and should have been so rated. A proper case

[6] United Nations Children Fund v. Blue Sea Line, 15 FMC 206, 209 (1972).
[7] Also see Johns Manville Products Corporation, 13 FMC 194, (1970) and Bulkley Dunton Overseas, S.A. v. Blue Star Shipping Corp., 8 FMC 137, 140 (1964).

for the recovery of reparation having been made on the three shipments, a refund in the amount of $551.08 is due the complainant; and it is so ordered.

(S) CAREY R. BRADY,
Settlement Officer.

FEDERAL MARITIME COMMISSION

DOCKET NO. 72-64

AMERICAN EXPORT LINES, INC., SEA-LAND SERVICE, INC., AND UNITED STATES LINES, INC.—POSSIBLE VIOLATIONS OF SECTION 18(b)(5) OF THE SHIPPING CT, 1916, IN CONNECTION WITH RATES ON MILITARY CARGO

DOCKET NO. 72-65

AMERICAN MAIL LINES, INC., AMERICAN PRESIDENT LINES, LTD. AND SEA-LAND SERVICE, INC.—POSSIBLE VIOLATIONS OF SECTION 18(b)(5) OF THE SHIPPING ACT, 1916 IN CONNECTION WITH RATES ON MILITARY CARGO

DISMISSAL OF PROCEEDINGS

November 17, 1976

The Commission instituted Docket No. 72-65 in December 1972, to determine the lawfulness under section 18(b)(5) of the Shipping Act, 1916 and Commission's General Order 29[1]
of certain rates bid by American Mail Lines, Ltd. (AML), American President Lines, Ltd. (APL), and Sea-Land Service, Inc., for the carriage of containerized military cargo between the West Coast of the United States and Japan pursuant to the Military Sealift Command Request For Proposal (RFP) 700, Second Cycle. The Military Sealift Command and American Export Lines, Inc. (AEL) intervened in the proceeding.

Concurrently with the issuance of an Order of Investigation in Docket No. 72-65, a similar proceeding—Docket No. 72-64—was also instituted to investigate the rates offered by Sea-Land, United States Lines (USL) and AEL in the trade between the East Coast of the United States and the United Kingdom and Europe. APL and AML intervened in that

[1] General Order 29, promulgated on November 28, 1972, sets forth standards for determining the level below which rates quoted for the transportation of U.S. Department of Defense cargoes pursuant to the military sealift procurement system and filed with the Commission pursuant to section 18(b)(1) of the Shipping Act, 1916, would be deemed to be so low as to be detrimental to the commerce of the United States within the meaning of section 18(b)(5) of the Act and to establish rules and regulations governing the accounting and allocation procedures which are utilized by the U.S. flag carriers in arriving at military rate quotations.

proceeding. Docket No. 72–64 never advanced to the hearing stage; instead, it was determined to pursue Docket No. 72–65 and hold Docket No. 72–64 in abeyance pending the outcome of Docket No. 72–65.

Of the nine military cargo rates placed under investigation in Docket No. 72–65, only APL's Cargo, N.O.S. rate was ultimately challenged and actively litigated by Commission Hearing Counsel in hearings held in connection with this proceeding. All other rates originally set down for investigation were, for reasons of compliance, admitted noncompliance, or cancellation, not put at issue in the hearings held before the Presiding Officer. At the conclusion of the hearings the Presiding Officer certified the record to the Commission for decision.

The stated purpose for continuing Docket No. 72–65 beyond the life of the challenged rates was to establish prospective guidelines regarding the application of G.O. 29, rather than to make any specific finding of violations. However, in view of the time that has elapsed since the two proceedings were instituted[2] and the imminent introduction of a new standardized cost information system, which, when fully implemented, will necessitate a further revision of G.O. 29, the establishment of guidelines at this time would appear to serve little regulatory purpose. Accordingly, Docket Nos. 72–64 and 72–65 will be discontinued. APL has currently pending a Motion to Dismiss Docket No. 72–65 on the grounds of mootness. In light of our action herein we need not consider the merits of APL's motion.

THEREFORE, IT IS ORDERED, That Docket No. 72–64 and Docket No. 72–65 are hereby discontinued without prejudice to the issues raised therein by any party.

By the Commission.

[SEAL] (s) FRANCIS C. HURNEY,
Secretary.

[2] The Commission determined not to issue a decision in Docket No. 72–65 pending a review by the Court of Appeals of G.O. 29. See *Sea-Land Service, Inc. v. Federal Maritime Commission*, Case No. 73–1204, December 14, 1974. The matter is now before a Commission Administrative Law Judge upon remand from the court.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 360(I)

NATIONAL STARCH &
CHEMICAL CORPORATION

v.

ATLANTIC CONTAINER LINE, LTD.

NOTICE OF DETERMINATION NOT TO REVIEW

November 12, 1976

Notice is hereby given that the Commission on November 12, 1976, determined not to review the decision of the settlement officer in this proceeding served November 1, 1976.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 360 (I)

NATIONAL STARCH & CHEMICAL CORPORATION

v.

ATLANTIC CONTAINER LINE, LTD

Reparation Awarded.

DECISION OF WALDO R. PUTNAM, SETTLEMENT OFFICER[1]

By complaint filed September 9, 1976, National Starch & Chemical Corporation (complainant) alleges that Atlantic Container Line, Ltd. (carrier) applied an incorrect rate on a container of "liquid synthetic resin" weighing 31,569 pounds, resulting in an overcharge of $92.63. While a violation of Shipping Act, 1916, is not alleged, it is presumed to be section 18(b)(3) which prohibits the assessment of freight charges in excess of those lawfully applicable at the time of the shipment.

The carrier denied the claim solely on the basis of Rule 9 of its tariff[2] which prohibits the payment of overcharge claims not presented to the carrier within six months after the date of the shipment.

According to the complainant, the carrier, under bill of lading No. A91402, dated August 22, 1975, transported a container of liquid synthetic resin valued at less than $1,000 per 2,240 pounds, net weight, on a house-to-house basis from New York to Le Havre, France. The carrier assessed a rate of $98.25 per 2,240 pounds on 31,569 pounds in accordance with Item No. 581.0001.220, 1st Revised Page 167 of the Conference tariff. The cargo should have been rated under tariff Item No. 581.0001.650 which provides for a rate of $72.00 subject to a minimum of 40,320 pounds, per container.[3] On the basis of an incorrect application of freight

[1] Both parties having consented to the informal procedure of Rule 19, 46 CFR 502.301-304(as amended) this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof. (Note: Notice of determination not to review November 12, 1976.)

[2] North Atlantic French Atlantic Freight Conference Tariff No. (3), FMC-4.

[3] Rule 4 of the Conference tariff provides the following:

E. Rates Applicable on Cargo Shipped to Stipulated Minima

1. Where in this tariff two rates are listed for a commodity, that rate noted alongside a qualification specifying a required minimum quantity, either weight or measurement, per Container or in Containers will be applicable to the contents of the Container/s provided the minimum set forth is met or exceeded. At the Shipper's option, a quantity less than the minimum may be freighted at the lower rate *provided the weight or measurement declared for rating purposes is increased to the minimum level.* (underscoring supplied).

charges, the complainant paid $1,446.95 ($1,384.64 plus a 4.5 percent currency surcharge of $62.31). The correct charges should have been $1,354.32 ($1,296.00 plus a 4.5 percent currency surcharge of $58.32). The resultant overcharge is $92.63 ($1,446.95 less $1,354.32).

In response to the served complaint, the carrier stated that it does not dispute the complainant's contention that the rate was incorrectly applied; however, it had no option but to deny the claim in accordance with its lawfully filed tariff.[4]

The Commission, in Informal Docket No. 115(I), *Colgate Palmolive Company* v. *United Fruit Company* reiterated wtat is specifically stated in *Proposed Rules—Time Limit on Filing Overcharge Claims* 12 F.M.C. 298, 308 (1969) that:

". . .once a claim has finally been denied by a carrier the shipper may still seek and in a proper case recover reparation before the Commission at any time within two years of the alleged injury, and this is true whether the claim has been denied on the merits or on the basis of a time limitation rule."

The Conference tariff clearly provides that the actual weight of a shipment may be increased to a specified minimum weight for the purpose of providing lower freight charges for the shipper. It is obvious that the higher rate assessed by the carrier in this instance can not apply; and the carrier has so admitted. Section 18(b)(3) of the Shipping Act, 1916, makes it unlawful for a carrier to charge, demand, collect or receive, a greater compensation than the rates or charges which are specified in its tariff.

The filing of a timely complaint has effectively eliminated the tariff technicality under which the claim originally was denied and inasmuch as a proper case for the recovery of reparation has been made, a refund of $92.63 is due the claimant, and it is so ordered.

(S) WALDO R. PUTNAM,
Settlement Officer.

[4] The shipment was dated August 22, 1975; the claim was filed June 28, 1976 and denied on July 1, 1976.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 345(I)

VANDOR IMPORTS

v.

ORIENT OVERSEAS CONTAINER LINES

NOTICE OF DETERMINATION NOT TO REVIEW

November 12, 1976

Notice is hereby given that the Commission on November 12, 1976, determined not to review the decision of the settlement office in this proceeding served November 3, 1976.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 345(I)

VANDOR IMPORTS

v.

ORIENT OVERSEAS CONTAINER LINES

Reparation awarded.

DECISION OF JUAN E. PINE, SETTLEMENT OFFICER[1]

By complaint filed on January 23, 1976, Vandor Imports (complainant) alleges that Orient Overseas Container Lines (OOCL), overcharged it (in violation of Section 18(b)(3) of the Shipping Act, 1916), by failing to pay 14 port equalization claims covering 21 shipments of cargo moving from Hong Kong to complainant located in San Francisco, California. The shipments were unloaded at OOCL's port of delivery at Oakland, California and moved overland truck collect to San Francisco to port of discharge shown on the ocean bills of lading. The claims were filed with the Commission within two years from the date when the cause of action arose (from February 28, 1974 to January 10, 1975). Reparation of $946.59 is being sought.

The equalization claims are based on the excess of the trucking rates from Oakland to San Francisco,[2] (paid by complainant) over the drayage rates within San Francisco. The trucking rates are published in California Public Utility Commission Tariff No. 2 and the drayage rates in California Public Utility Commission Tariff No. 19.

The claims are based on Rule 28 of OOCL's Hong Kong Eastbound Pacific Coast Tariff No. 1 (FMC-1)which provides:

[1] Both parties having consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.301-304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.
(Note: Notice of Determination not to review November 12, 1976.)

[2] Complainant has submitted freight bills covering the truck movement via D & J Transportation of the subject shipments from Oakland to San Francisco.

"If the carrier discharges cargo at a discharge port other than the port of discharge named in the bill of lading, the carrier may arrange, at its option, to move the shipment from actual port of discharge as follows:

"To the port of destination stated in the bill of lading, alternatively the carrier may forward the cargo direct to a point designated by the consignee, provided the consignee pays the costs which the consignee normally would have incurred to move the cargo to such point had the cargo been discharged at the port of destination stated on the bill of lading."

Rule 28 was amended slightly effective October 1, 1974, to read as follows:

"If the carrier discharges cargo at a discharge port other than the port of discharge named in the bill of lading, the carrier (C) shall arrange, at its (C) expense to move the shipment from actual port of discharge as follows: To the port of destination stated in the bill of lading, alternatively the carrier may forward the cargo direct to a point designated by the consignee, provided the consignee pays the costs which the consignee normally would have incurred to move the cargo to such point had the cargo been discharged at the port of destination stated on the bill of lading."

OOCL advised complainant that prior to October 1974, San Francisco, Oakland and Alameda were considered to be one bill of lading port and that the above rule did not apply.

In its partial adoption of the decision in *Konwal Co., Inc.* v. *Orient Overseas Container Line* in Informal Docket No. 327(I), served November 12, 1975, the Commission held:

". . . It is clear therefore that OOCL had discharged its cargo at a discharge port other than that specified in the bill of lading. The carrier, then, had only two lawful options. Both of these options were provided by Rule 28. Under its terms the carrier could:

(1) move the cargo to the port of discharge specified in the bill of lading; or

(2)forward the cargo direct to a point designated by the consignee. . . ."

"From the record, the carrier apparently availed itself of both options with respect to the various shipments. It is our conclusion that having elected to act under Rule 28, the carrier became bound by the provisions thereof. . . ."

OOCL also advised complainant that it has determined from various trucking companies that re-positioning costs are approximately $16.50 per container, which is that amount it agrees to reimburse consignees for full container loads.

This allegation was laid to rest in Konwal, supra, at page 5, footnote 4, of the Settlement Officer's decision:

"Allegedly the policy of OOCL with respect to full container loads being delivered to San Francisco is to give $16.50 allowance per container to the consignee to cover the approximate cost of returning the empty container to OOCL's terminal in Oakland. Reparation of $16.50 is denied as the tariff contains no such allowance and payment of such allowance would violate Section 18(b) of the Shipping Act, 1916. KONWAL has agreed to cancel the $16.50 claim."

This finding was not reviewed by the Commission. The Commission's decision in *Konwal* addressed itself only to the sharing of the payment of truck transportation rates in Rule 28 of OOCL's tariff on file with the Commission at the time of the shipments. "That . . . is all that is at issue here." (Page 4, Partial Adoption of Decision, November 12, 1975) Since

the Settlement Officer's finding stands unreviewed by the Commission and is of precedential value, it is deemed dispositive of the issue also.

Complainant has carefully documented its claim by submitting ocean bills of lading, and local freight bills or memorandum of local bills of lading covering the truck movements from Oakland to San Francisco, indicating local trucking and drayage rates assessed thereon.

The subject claims are listed below.

Claim	Local Freight Bill Date	Equalization	Weight	Rate and Drayage Costs	Transportation Charges	
V-01	2-28-74 F/B14354	Oakland to S.F.	2 vans	$ 75.00	$150.00	
		S.F. to S.F. Equalization	2 vans	45.00	90.00	
						$60.00
	F/B14261	Oakland to S.F.	832#	$ 1.57	$ 13.06	
			1,800# weight deficit	1.96	35.28	
			2,368#	1.57	37.18	
				s/c	2.50	
				3%	2.57	
					$ 90.59	
		S.F. to S.F.	832# ($1.10)	$ 9.15 24.84		
			1,800# ($1.38) (3%)	1.02	35.01	
		Equalization				$55.58
V-02	4- 5-74 F/B11906	Oakland to S.F.	1 van	$ 75.00	$ 75.00	
		S.F. to S.F. Equalization	1 van	45.00	35.00	
						$30.00
V-03	4-25-74 F/B10403	Oakland to S.F.	1 container	$ 75.00	$ 75.00	
		S.F. to S.F. Equalization	1 container	45.00	45.00	
						$30.00
V-04	6- 6-74 F/B12563	Oakland to S.F.	1,632#	$ 4.31	$ 70.34	
				3%	2.11	
				s/c	1.50	
					$ 73.95	
		S.F. to S.F.	1,632 as 2,000# ($1.10) (3%)	$ 22.00 .66	22.66[a]	
		Equalization				$51.29

Claim	Local Freight Bill Date	Equalization	Weight	Rate and Drayage Costs	Transportation Charges	
V–05	6– 6–74 F/B12564	Oakland to S.F.	3 vans	$ 75.00	$225.00	
		S.F. to S.F.	3 vans	45.00	135.00	
		Equalization				$90.00
V–06	8–22–74 F/B15289	Oakland to S.F.	9,257 as 10,000#	$ 1.20	$120.00	
				1%	1.20	
				s/c	3.40	
					$124.60	
		S.F. to S.F.	9,257 as 10,000#			
			($.82)	$ 82.00		
			(1%)	.82	82.82	
		Equalization				$41.78
V–07	8–23–74 F/B15343	Oakland to S.F.	2 containers	$ 75.00	$150.00	
		S.F. to S.F.	2 containers	45.00	90.00	
		Equalization				$60.00
	F/B15041	Oakland to S.F.	1,960#	$ 4.62	$ 58.21	
				1%	.59	
				s/c	1.50	
					60.31[4]	
		S.F. to S.F.	1,960 as 2,000#			
			($1.18)	$ 23.60		
			(1%)	.24	$ 23.84	
		Equalization				$36.47
V–08	9–23–74 F/B9751	Oakland to S.F.	1 container	$ 75.00	$ 75.00	
		S.F. to S.F.	1 container	45.00	45.00	
		Equalization				$30.00
	F/B9752	Oakland to S.F.	1,300#	$ 4.62	$ 60.06	
				s/c	1.50	
				1%	.62	
					$ 62.78[5]	
		S.F. to S.F.	1,300 as 2,000#			
			($1.18)	$ 23.60		
			(1%)	.24	$ 23.84	
		Equalization				$38.94

Claim	Local Freight Bill Date	Equalization	Weight	Rate and Drayage Costs	Transportation Charges	
V–09	F/B3239	Oakland to S.F.	1 container	$ 75.00	$ 75.00	
		S.F. to S.F.		45.00	45.00	
		Equalization				$30.00
	F/B2950	Oakland to S.F.	1,000#	$ 4.62	$ 46.20	
				s/c	1.00	
				1%	.47	
					$ 47.47	
		S.F. to S.F.	1,000# ($1.92)	$ 19.20		
			(1%)	.19	$ 19.39	
		Equalization				$28.28
V–10	10–24–74 F/B3819	Oakland to S.F.	3,630 as 5,000#	$ 2.52	$126.00	
				s/c	2.50	
				1%	1.29	
					$129.79	
		S.F. to S.F.	3,630 as 4,000# ($1.38)	$ 55.20		
			(1%)	.55	$ 55.75	
		Equalization				$74.04
	F/B4233	Oakland to S.F.	1 container	$ 75.00	$ 75.00	
		S.F. to S.F.	1 container	45.00	45.00	
		Equalization				$30.00
V–11	10–30–74 F/B3824	Oakland to S.F.	2 vans	$ 75.00	$150.00	
		S.F. to S.F.	2 vans	45.00	90.00	
		Equalization				$60.00
V–12	11–26–74 F/B4060	Oakland to S.F.	1 container	$ 80.00	$ 80.00	
		S.F. to S.F.	1 container	50.00	50.00	
		Equalization				$30.00
V–13	12–11–74 F/B4766	Oakland to S.F.	955#	$ 6.93	$ 66.18	
				s/c	1.00	
				(1%)	.67	
					$ 68.85[6]	
		S.F. to S.F.	955 ($2.88)	$ 27.50		
			(1%)	.28	$ 27.78	
		Equalization				$41.07

Claim	Local Freight Bill Date	Equalization	Weight	Rate and Drayage Costs	Transportation Charges	
	12–12–74 F/B4694	Oakland to S.F.	1 container	$ 80.00	$ 80.00	
		S.F. to S.F.	1 container	50.00	50.00	
		Equalization				$30.00
V–14	1–10–75 F/B11646	Oakland to S.F.	1 van	$ 80.00	$ 80.00	
		S.F. to S.F.	1 van	50.00	50.00	
		Equalization				$30.00
	F/B11483	Oakland to S.F.	1,476#	$ 6.93	$102.29	
				s/c	1.50	
				(1%)	1.04	
					$104.83	
		S.F. to S.F.	1,476 as 2,000			
			($1.77)	$ 35.40		
			(1%)	.35	$ 35.75	
		Equalization				$69.08
		Total				$946.53[7]

[3] The local drayage computation is $22.66 resulting in a claim for $51.29. Claimant erroneously arrived at a local drayage computation of $22.60, claiming $51.35 due.

[4] Correct freight charges would be 1,960#($4.62) $90.55 + 1% ($.91) + s/c$1.50, or $92.96. However D & J Transportation only assessed charges of $60.31. Claimant states that D &J never submitted a balance due bill for the additional sum of $32.65. As $60.31 is what was actually paid by claimant, the claim will not be changed.

[5] Should be $62.18. However, as the claim is arrived at by using the local transportation charge of $62.78 actually paid by claimant, the 60 cents overcharge paid by claimant for local transportation will not be changed.

[6] Should be $67.85. However, as the claim is arrived at by using the local transportation charge actually paid by claimant, the $68.85 local transportation charge will not be changed.

[7] Exact amount indicated by complainant less the six cent error in Claim V–04 computations as explained in footnote 3.

From the foregoing, OOCL, is in violation of Section 18(b)(3) of the Shipping Act, 1916, for receiving a different compensation for transportation or any service in connection therewith than the rates and chaages specified in its tariff, and by its failure to remit in any manner any portion of the rates or charges so , and by its failure to remit in any manner any portion of the rates or charges so specified, in accordance with its tariff. Therefore, complainant is awarded reparation of $946.53 with interest at the rate of six percent per annum if not paid within 30 days of the date hereof.

(S) JUAN E. PINE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 347(I)

WILMOT ENGINEERING COMPANY

v.

UNITED STATES LINES, INC.

DISMISSAL OF COMPLAINT

November 18, 1976

Settlement Officer Waldo Putnam served his decision in this proceeding November 8, 1976, wherein he determined that complainant's claim for reparation on an alleged overcharge of ocean freight should be denied.

Our review of this decision discloses that the claim was filed by Traffic Service Bureau, Inc. as agents for complainant. The Commission's Rules of Practice provide that practice before the Commission is limited to attorneys, persons admitted to practice, or officers or regular employees of a party to a proceeding (46 CFR 502.26 and 502.27). Practice before the Commission by firms or corporations on behalf of others is specifically prohibited (46 CFR 502.28).

There is nothing in the Commission's files to indicate that the person filing this claim is an attorney, or admitted to practice before the agency. Neither does it appear that he is an officer or regular employee of complainant. Rather, the claim was submitted by one firm on behalf of another. In view of these circumstances, it is concluded that the complaint was not properly submitted under the Rules of Practice and cannot be considered on its merits.

Accordingly, it is ordered that the complaint in this proceeding is dismissed without prejudice to resubmission within the two-year statutory time period for filing of such claims.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 342(I)

CELESTIAL MERCANTILE CORPORATION

v.

M. GOLODETZ & CO., INC.
AS AGENTS FOR TELFAIR SHIPPING CORP.

NOTICE OF ADOPTION

November 24, 1976

The Commission by notice served August 6, 1976, determined to review the decision of the Settlement Officer in this proceeding served July 22, 1976. Upon completion of review it has been determined that the decision of the Settlement Officer should be adopted as the decision of the Commission.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 342(I)

CELESTIAL MERCANTILE CORPORATION

v.

M. GOLODETZ & CO., INC.
AS AGENTS FOR TELFAIR SHIPPING CORP.

Adopted November 24, 1976

Reparation Denied.

DECISION OF CAREY R. BRADY, SETTLEMENT OFFICER[1]

Complainant seeks reparation in the amount of $1,466.27 from respondent,[2] claiming a freight overcharge on a shipment from Philadelphia, Pennsylvania to Dubai, United Arab Emirates, carried aboard the "Nego May" on bill of lading dated September 29, 1975, pursuant to the terms of Triton International Carriers, Ltd.—United Kingdom/Continental Europe/Mediterranean/Red Sea/East Africa and Persian Gulf Tariff FMC No. 2.

The shipment consisted of 900 cartons of motor oil weighing 54,000 pounds and measuring 1170 cubic feet. The shipment was rated by the respondent on the basis of $129.25 per cubic feet, the applicable rate for "Oil, Lube". Total charges were assessed in the amount of $3,780.56.

Complainant maintains the proper rate is $96.00 per 2240 pounds but does not indicate the tariff authority.

Both parties agree that the claimant booked a shipment of 900 cartons of motor oil and was originally quoted a rate of $96.00 per 2240 pounds by Triton's agent, F. M. Clifford Agencies and was billed at that quoted rate. When the bill of lading was to be picked up from the Timechartered Owners' agent, M. Golodetz & Co., Inc., complainant was advised Triton's agent quotation was erroneous and the appropriate rate was $129.25 per measurement ton. Complainant paid the new quoted rate under protest.

[1] This decision was adopted as the decision of the Commission November 24, 1976.

[2] The original charterer, Triton International Carriers, Ltd., through default in payments of hire breached the terms of the charter agreement. The Timechartered Owners, Telfair Shipping Corporation and their agents, M. Golodetz & Co., Inc., continued to prosecute the voyage in consideration of the freight monies being collected by M. Golodetz & Co., Inc. and applied in satisfaction of Telfair Shipping Corporation's lien against the cargo and freight monies.

A review of Triton's tariff discloses the two rates in question are both rated under "Oil, Lube" found on Page 20, second revision, effective September 24, 1975. The commodity rate is in two parts. The first quotes the rate of $129.25 W/M from Searsport, Me./Brownsville, Texas Range to Ports of Call in the Mediterranean/Red Sea/East Africa/Persian Gulf. The second rate quoted is a temporary rate of $96.00 W from Philadelphia to Aqaba-Jeddah-Abu Dubai and Doha, effective September 24, 1975 through October 27, 1975. The specific temporary rate does not identify Dubai as a port eligible for the reduced rate, hence the shipment must be rated under the general commodity rate of $129.25 W/M. Therefore, the reparation is denied.

(S) CAREY R. BRADY,
Settlement Officer.

FEDERAL MARITIME COMMISSION

DOCKET NO. 73-44

KRAFT FOODS

v.

MOORE MCCORMACK LINES, INC.

Carrier tariff rule requiring claim for adjustment of freight charges to be filed with the carrier before shipment leaves custody of the carrier cannot be used to defeat a claim filed with the Commission within the two-year statute of limitation period.

Where shipment has left custody of the carrier before a claim for adjustment in measurement is filed, a heavy burden of proof is imposed.

Reparation awarded.

John J. Lavaggi, William Levenstein for complainant. J. D. Stratton for respondent.

REPORT ON REMAND

November 24, 1976

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett and James V. Day, *Commissioners.*)*

PROCEEDINGS

This proceeding involves a claim by Kraft Foods for reparation from Moore McCormack Lines, Inc. for alleged overcharge of ocean freight. The proceeding is before us on remand from the United States Court of Appeals for the District of Columbia Circuit; *Kraft Foods v. Federal Maritime Commission,* decided July 13, 1976. We previously denied the claim by decision served March 26, 1974, and denied a petition for reconsideration by order served December 13, 1974. Our denial was based solely on the fact that respondent's applicable tariff contained a provision (Rule 16) which would not permit it to make adjustments in freight charges based on alleged error in weight or measurement if the shipment involved had left the custody of the carrier. So far as pertinent Rule 16 provides as follows:

*Commissioner Bob Casey not participating.

16. OVERCHARGES

Claims for adjustment of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carrier in writing before shipment involved leaves the custody of the carrier.

We had determined that the tariff rule was not shown to be unlawful and inasmuch as section 18(b)(3) of the Shipping Act, 1916, required strict adherence to lawful tariff rules the claim must be denied since it was brought well after the shipment had left the custody of the carrier.

The Court of Appeals on review has determined that Rule 16 is not a valid tariff provision, insofar as it conflicts with section 22 of the Shipping Act, 1916. Section 22 provides for filing of complaints before the Commission and permits such filing within two years of an alleged violation of the Shipping Act. The Court found that while Rule 16 does not prevent the filing of a claim for reparation based on weights or measurements it does require that such a claim be rejected unless presented to the carrier before the shipment leaves its custody. The right to file a claim becomes illusory once the carrier has delivered the shipment. In effect therefore the Rule sets up as a period of limitation, the time during which the shipment remains in the custody of the carrier, which limitation was viewed by the Court as infringing on the rights granted by section 22 of the Shipping Act. The case was remanded to the Commission for further proceedings on the merits of the claim.

FACTS

This proceeding was conducted under the Commission's shortened procedure by agreement of the parties. The evidence of record is limited to those materials included with the complaint and subsequently submitted on exception.

The shipment from which the complaint arose was transported on the *S. S. Mormacbay* of Moore McCormack which sailed from New York on December 31, 1972, arrived in Mombasa on February 3, 1973, and left Mombasa on February 10, 1973. Between February 3 and February 10, 1973, the disputed cargo was unloaded and accepted by the consignee/customer of Kraft Foods.

The transportation charges levied in this case were based upon a measurement of 284 cubic feet, shown on the bill of lading and on the reverse side of the dock receipt. As a result of these charges, the consignee notified Kraft Foods by letter of February 12, 1973, that it seemed that the freight had been overcharged. Thereafter, on February 23, 1973, complainant Kraft Foods notified Moore McCormack of the suspected overcharge and Kraft Foods' challenge to the measurements on which the charges were based. Complainant contended that the accurate measurement of the shipment was 146 cubic feet as shown on various documents including the face of the dock receipt. Respondent countered by asserting that the 146 cubic foot measurement was not that observed

upon delivery of the cargo to the loading pier but that the 284 cubic foot measure shown on the bill of lading and the reverse side of the dock receipt was the measure observed upon delivery.

In support of its claim complainant has submitted the following:

1. A copy of its sales invoice No. 01186 indicates that a shipment was to be delivered to Moore McCormack on December 28, 1972, to be shipped on the *S. S. Mormacbay* to Nairobi Supermarket via Mombasa. The invoice indicates that the shipment was to consist of:

15 cases (5862) 12/6 1/4 oz. Noodles Romanoff
25 cases (5873) 16/1 lb. 3-2/3 oz. Spag. W/MT Sce
15 cases (6073) 24/10 1/2 oz. Min Col Flav Marsh
20 cases (6080) 6/1 lb. Min Marshmallow—W.
40 cases (6100) 24/10 oz. Jet Puff Marshmallow

2. A copy of Moore McCormack Lines bill of lading No. 126 dated December 29, 1972, covering a shipment on the *S. S. Mormacbay* by complainant to Nairobi Supermarket via Mombasa. The bill of lading indicates that the shipment consisted of 40 cases of Noodle Dinner/ Spaghetti Dinner measuring 67 cu. ft. and 75 cases of Marshmallows measuring 217 cu. ft., for a total of 284 cu. ft.

3. A copy of Moore McCormack Lines dock receipt which indicates it covers complainant's invoice No. 01186 and BL 126, delivery date December 28, 1972. The front of the dock receipt describes the shipment the same as the bill of lading except the measurement for the Noodle/ Spaghetti Dinner is stated as 32 cu. ft. and for the Marshmallows is stated as 114 cu. ft., with a total of 146 cu. ft. The back of the dock receipt contains handwritten notations listing the measurements of undescribed lots of 30, 10, 20, 30 and 25 packages. The total measurement is stated as 283.50 cu. ft.

4.Copies of complainant's price list pages which indicate the standard measurement of complainant's products identified by Product Nos. which coincide to those listed in complainant's Invoice No. 01186.

5. A reconstructed packing list dated March 9, 1973 which totals the cubic measurement for the number and type of products listed in the shippers invoice, using the standard cube listed in the shippers price list. The total cubic measurement computes to 145.01 cu. ft.

DISCUSSION

The lesson of the Court of Appeals opinion in *Kraft* is clear. Tariff provisions of the type involved here (Rule 16) cannot be used before the Commission to defeat a claim for reparation which was otherwise properly filed within the two year statute of limitation period. Notwithstanding the existence of such a tariff provision, properly filed claims must be considered on their merits.

In considering such claims, determination of the applicable rate shall be based on what can be shown is the true nature of the commodity shipped.

Such a determination will be based on all the evidence of record with no single document or piece of evidence necessarily being controlling. As we said in Informal Docket 283(I) *Western Publishing Company, Inc. v. Hapag Lloyd A.G.*, order served May 4, 1972.

"the test is what claimant can now prove based on all the evidence as to what was actually shipped, even if the actual shipment differed from the bill of lading description. In rating a shipment the carrier is not bound by shipper's misdescription appearing on the bill of lading. Likewise, claimant is not bound as least where the misdescription results from shipper's unintentional mistake or inadvertence. But where the shipment has left the custody of the carrier and the carrier is thereby prevented from personally verifying claimant's contentions, the claimant has a heavy ultimate burden of proof to establish his claim".

As indicated above, in considering claims involving disputes as to the nature of cargo (either weight, measurement or description), if the cargo has left the custody of the carrier before the claim is brought and the cargo cannot be reexamined, the Commission has traditionally imposed a heavy burden of proof on complainant. Nothing in the Court's opinion in *Kraft* should change this.

In the instant case complainant seeks an adjustment in the measurement of the cargo and the cargo was not reexamined before the claim was brought. Accordingly, the heavy burden of proof requirement applies. We think it has been met.

Complainant has provided rather detailed information which indicates the type, quantity, and size of the components of the shipment in question. The sales invoice, the bill of lading and the dock receipt all indicate that the shipment consisted of 40 cases of Noodle Dinner/ Spaghetti Dinner and 75 cases of Marshmallows. The sales invoice further breaks down the shipment into lots of 15 Noodles Romanoff and 25 Spaghetti with meat sauce to comprise the 40 cases of noodles/spaghetti and lots of 15 miniature colored flavored marshmallows, 20 miniature marshmallows and 40 jet puff marshmallows to comprise the 70 cases of marshmallows. Each of these lots is identified by a four digit number. The identification numbers coincide with the numbers contained in complainant's price list which indicates the standard measurements of complainant's products. From all of this information it is demonstrated that a shipment consisting of the number of cases and types of products listed, when checked against complainant's sales brochure, would have a standard cubic measurement of 146 cu. ft., the measurement for which complainant argues the shipment should have been rated.* As indicated above this measurement is also the amount shown on the front of the dock receipt.

The evidence to the contrary consists of the handwritten entries in the bill of lading and computations on the back of the dock receipt which

*The actual figure on which complainant bases its claim is 153 cu. ft. This figure is calculated employing respondent's applicable tariff rule which governs rounding off of fractions in computing cubic measurements.

would indicate the shipment measured 284 cu. ft. These figures are said by respondent to represent the actual measurements taken at the pier.

Generally it is difficult to overcome evidence regarding measurement of cargo which measurement is actually recorded by measuring at the pier. However, the measurements on the back of the dock receipt in this case have absolutely no relation to what are shown to be the standard measurements of the cargo shipped. Additionally, the number of packages of various sizes recorded on the back of the dock receipt and said to represent this shipment bear no relation to the number of packages of various sizes which are otherwise shown by complainant's evidence to comprise this shipment. We can only conclude that the preponderance of evidence is such that the measurements said to be recorded at the pier at the time of shipment cannot be the measurements for the shipment in question. Such a variance in quantities and measurement might have been occasioned by mistake in matching shipment with dock receipt or by some other similar mistake. We need not speculate further as to the reason or explanation for the recording of such measurements.

We conclude therefore that complainant has satisfied its burden of proof in this proceeding and is entitled to reparation in the amount of $364.46. It is so ordered.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-30

PAN AMERICAN HEALTH ORGANIZATION

v.

PRUDENTIAL LINES, INC.

NOTICE OF ADOPTION

September 23, 1976

The Commission by notice served October 28, 1976, determined to review the initial decision of the Administrative Law Judge in this proceeding served September 23, 1976. Upon review, the Commission has determined to adopt the ultimate conclusions of the initial decision to the effect that Commission precedent provides a legitimate basis for awarding reparation in this proceeding and that it be awarded.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 76-30

PAN AMERICAN HEALTH ORGANIZATION

v.

PRUDENTIAL LINES, INC.

Adopted September 23, 1976

Shipment described by shipper as "Cyanogas A Dust, Calcium Cyanide 42%, ICC Class B Poison" should have been charged rate under "Insecticides, NOS, class 10" rather than at higher tariff rate for "Chemicals NOS." Reparation awarded.

William Levenstein for Pan American Health Organization, complainant.

John J. Purcell of Lilly, Sullivan & Purcell for Prudential Lines, Inc., respondent.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

INTRODUCTION

By complaint filed May 24, 1976, the complainant alleges that an inapplicable rate was charged on a shipment of 640 drums of a dry chemical used as a pesticide, from the port of New York to Guayaquil, Ecuador. The bill of lading was dated June 27, 1975. The shortened procedure was followed.

Freight charges of $6,341.39 were paid, based on the rate of $148.25 per 40 cubic feet (W/M) for "Chemicals, N.O.S., non-hazardous, actual value over $700 per freight ton." (Atlantic & Gulf/West Coast of So. Amer., Freight Tariff F.M.C. No. 1, page 47, 8th rev., effec. Dec. 1, 1975.) The complainant asserts that the 640 drums of "Cyanogas A Dust, Calcium Cyanide 42%, ICC Class B Poison," as described in the bill of lading, should have been charged $4,320.28, based on the rate of $101 per 40 cubic feet (W/M) for "Insecticides, N.O.S., dry, liquid or paste, actual value over $600 per freight ton." (Atlantic & Gulf/West Coast of So. Amer., Freight Tariff F.M.C. No. 1, page 179, 5th rev., effec. June 2,

[1] This decision became the decision of the Commission September 23, 1976.

1975; page 168, 10th rev., effec. April 7, 1975; and page 137, 9th rev., effec. September 16, 1974.) The parties do not dispute the propriety of the additional charges for port congestion and bunker surcharge.

Discussion and Conclusions

The shipper has established, by documentary evidence[2] attached to the pleadings, that the subject commodity shipped was, in fact, a pesticide, which, by commodity index listing under the appropriate and then-effective tariff, should properly have been rated under the commodity description for "Insecticides, N.O.S., class 10."

It is undisputed that neither term "pesticide" nor "insecticide" appeared on the bill of lading.[3] The complainant points out (Reply Memorandum) that "the bill of lading is their document (the carrier's), not the shipper's," citing the Harter Act, thus placing the responsibility for the incorrectness of the bill of lading description on the carrier. This argument ignores the fact that it is the shipper who provides the description on the bill of lading, and not the carrier, in the section of the form specifically designated as follows: "PARTICULARS FURNISHED BY SHIPPER—Shipper's Description Of Packages And Goods." This fact of life is not changed by the legal event that transforms the *completed* document into a document "issued by" the carrier.

Where the shipment has left the custody of the carrier and the carrier is thus prevented from personally verifying the complainant's (new) description, the Commission has held that the complainant has a "heavy burden of proof" and must establish, with reasonable certainty and definiteness, the validity of the claim. *Western Publishing Co. v. Hapag Lloyd A.G.*, 13 SRR 16, 17 (1973); *Johnson & Johnson Intl. v. Venezuelan Lines*, 16 F.M.C. 87, 94 (1973); *Colgate Palmolive Peet Co. v. United Fruit Co.*, 11 SRR 979, 981 (1970). It is usually the case, as it is here, that the carrier, in classifying and rating a shipment, must look to the information supplied him by the shipper or freight forwarder. Elementary fairness would seem to dictate that the carrier should be entitled to rely on such information, and to charge and collect freight in accordance with the description supplied by the shipper. To require the respondent or any other carrier to inquire of a shipper as to whether the supplied description of cargo is correct would place an undue burden on the carrier. We cannot expect the carrier to be a "mind-reader" (n.b., sealed drums) or a chemical analyst. Thus, we cannot quarrel with the appropriateness of the carrier's initial reliance on Item (r) on page 10 of the filed tariff.[4]

The importance of declaring in bills of lading the correct description of

[2] Extracts from Condensed Chemical Dictionary, manufacturers' brochures and bill of lading.

[3] The record also discloses that none of the documentation which the shipper *now* produces to show that Cyanogas A Dust is, in fact, a pesticide and/or insecticide was ever presented to the carrier at or before the subject shipment.

[4] "(r): Bills of lading describing articles by trade name are not acceptable for commodity rating. Shippers are required to describe their merchandise by its common name, to conform to merchandise descriptions appearing herein. Bill of lading reflecting only trade names will be automatically subject to application of the rate specified herein for Cargo, N.O.S. as minimum."

the cargo shipped cannot be overemphasized. The carrier has the right to expect that a shipper will properly identify his shipment, just as the shipper has the right to expect the carrier to charge the proper rate for the type of goods actually carried. (*Cf.* recent Initial Decision in *Commercial Solvents Corp. v. Moore-McCormack Lines*, Docket No. 75–50, served September 16, 1976.) The now-prevalent practice of some shippers to provide trade name descriptions for their cargoes, or vague descriptions that do not comport with anything listed on filed tariff commodity index lists, and then a year or more later, to play the "rating game" by newly arguing (with documentation never before presented to the carrier) that some other tariff rate (lower, of course) should have been used, should be discouraged. The fact that there are firms that offer to "audit" shippers' records in the hopes of finding just such potential conflicts, with regard to long-completed shipments, does not make the practice any more palatable.[5] A more equitable rule would seem to limit reparations to those cases where the actual language used on the face of the bill of lading indicates an improper misclassification or obvious disregard, by the carrier, of the descriptive language used by the shipper. Furthermore, a shipper who insists upon using a trade name, rather than an appropriate and readily-available commodity index description in the filed tariff, should be held to do so at his peril—especially in view of the duly filed "trade name" *caveat* expressed in Item (r), page 10, of the instant tariff. (*Supra*, fn. 4.)

Having said this, however, we must return to what the law is under present Commission policy and case interpretation, and this requires a finding for the complainant. (See *Ludwig Mueller Co. v. Peralta Shipping Corp.*, 8 F.M.C. 361 (1965); *Ocean Freight Consultants, Inc. v. Bank Line, Ltd.*, 9 F.M.C. 211 (1966); *Corn Products Co. v. Hamburg-Amerika Lines*, 10 F.M.C. 388 (1967).) On the unavailability of Item (r), page 10 of the tariff, as a defense to claims such as these, see *Abbott Laboratories v. Prudential-Grace Lines*, 17 F.M.C. 186 (1973).

Past Commission policy and precedent have unquestionably declared shipper's misdescriptions of cargo to be legitimate bases to award relief, even without fault on the part of the carrier. In cases involving alleged overcharges under section 18(b)(3) of the Act, the Commission has determined that the controlling test is what the complainant (shipper) can prove was actually shipped. *Union Carbide Inter-America v. Venezuelan Line*, 17 F.M.C. 181, 182 (1973); *Abbot Laboratories v. Moore-McCormack Lines, Inc.*, 17 F.M.C. 191, 192 (1973); *Western Publishing Co. v. Hapag Lloyd A.G.*, 13 SRR 16, 17 (1973).

Accordingly, I must conclude, and so find, that the complainant is entitled to the reparation requested, albeit in the slightly smaller amount

[5] *Cf.*, dissenting remarks of Commissioner Hearn in *Ocean Freight Consultants, Inc. v. Bank Line, Ltd.*, 9 F.M.C. 211, 216-218 (1966).

of $2,021.11 (the port congestion charge was mis-stated by 3 cents on page 2 of the complaint).

IT IS SO ORDERED.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
September 23, 1976.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 355(I)

SCM CORPORATION

v.

SEATRAIN INTERNATIONAL, S.A.
&
SEATRAIN U.K. LTD.

NOTICE OF ADOPTION

December 3, 1976

The Commission by notice served August 12, 1976, determined to review the decision of the Settlement Officer in this proceeding served July 30, 1976. Upon completion of review it has been determined that the decision of the Settlement Officer should be adopted as the decision of the Commission.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

IFORMAL DOCKET NO. 355(I)

SCM CORPORATION

v.

SEATRAIN INTERNATIONAL, S.A.
&
SEATRAIN U.K. LTD.

Adopted December 3, 1976

Reparation Awarded.

DECISION OF WALDO R. PUTNAM, SETTLEMENT OFFICER[1]

By complaint filed with the Commission under date of May 28, 1976, SCM Corporation (complainant) alleges that Seatrain International, S.A. and Seatrain, U.K. Ltd., (carrier) assessed incorrect emergency bunker surcharges resulting in a collective overcharge of $328.84 on three shipments transported during June and July 1974. The claims originally were denied solely on the basis of the carriers so-called six-month rule[2] which limits the filing of overcharge claims to a period of within six months from the date of shipment.

The carrier's response to the served complaint merely consisted of a copy of a notice to the complainant advising that the claim had been reviewed and payment would be forthcoming.[3] The notice also contained a request to the Settlement Officer to discontinue this docket based upon payment of the claim.[4]

Unfortunately, discontinuance of this proceeding without first determining the merits of the claims is not possible without also finding the carrier in violation of its governing tariff and, as a consequence, the Commission's statutes. Accordingly, in order to prevent the carrier from being

[1] Both parties having consented to the informal procedure of Rule 19 of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2] North Atlantic Westbound Freight Associations' Tariff No. 33, Rule 12.

[3] See Footnote 1—General Order 16, Amendment 12 (section 502.304(e)) provides in pertinent part that failure of the carrier to ". . . . . indicate refusal or consent *in its response* will be conclusively deemed to indicate such consent."

[4] By letter dated July 20, 1976, claimant advised that the claim has been paid in full.

charged with a violation of section 18(b)(3) of the Shipping Act, 1916, as amended,[5] I find that the complainant has made a case for the recovery of the excess bunker surcharge and I hereby authorize and order reparation in the amount of $328.84.

However, the carrier, in this instance, was perfectly within its rights to deny the subject claim; and, in fact, it was *required* to do so under the terms of its tariff. The unauthorized payment of an otherwise legitimate claim in response to the application of stimuli while denying all other similar claims absent such stimuli, represents precisely the type of discriminatory practices proscribed by section 16 First of the Shipping Act, 1916. I am not here attempting to determine the justness of reasonableness of the carrier's past claims handling practices; nor am I, at this time, alleging any impropriety on the part of the carrier in its handling of such claims. I do, however, feel duty-bound to remind the carrier that future tariff violations could carry with them the attendant penalties imposed as a result of concurrent violations of the shipping statutes administered by this Commission.

(S) WALDO R. PUTNAM,
Settlement Officer.

[5] Section 18(b)(3) of the Shipping Act, 1916, as amended forbids a carrier to retain freight charges in excess of those authorized under its effective tariff. That section also makes it unlawful for a carrier to extend or deny to any person, any privilege or facility except in accordance with its tariffs.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-37

AMERICAN CRUISE LINES, INC.—PETITION FOR DECLARATORY ORDER

DENIAL OF PETITION

December 14, 1976

This proceeding was initiated as a result of a Petition for Declaratory Order filed by American Cruise Lines, Inc. (ACL or Petitioner). Specifically, ACL requests that the Commission declare that the requirements of section 3, Public Law 89-777 (46 U.S.C.A. 817e) do not apply to its operations.[1]

Notice of ACL's Petition was published in the *Federal Register* and Commission Hearing Counsel submitted a response opposing the ACL petition. The American Society of Travel Agents indicated their opposition to the ACL Petition and requested additional time to submit a brief, but they failed to do so.

ACL, a Delaware Corporation, is engaged in the transportation of passengers for hire between various points on the Atlantic Coast of the United States, under operating authority granted by the Interstate Commerce Commission (ICC), to wit: Certificate of Public Convenience and Necessity No. W-1283. ACL presently provides service utilizing two vessels, the *M/V American Eagle* and the *M/V Independence*, both of which have berth or stateroom accommodations for 50 or more passengers. Although ACL has complied with the provisions of sections 2 and 3 of P.L. 89-777 and the Commission's Regulations, 46 C.F.R. 540 *et seq.*, it has done so under protest with respect to section 3.[2]

ACL takes the position that its status as an ICC certificated carrier

[1] Section 3 of P.L. 89-777 provides, in pertinent part, that:

No person in the United States shall arrange, offer, advertise, or provide passage on a vessel having berth or stateroom accommodations for 50 or more passengers and which is to embark passengers at United States ports without there first having been filed with the Federal Maritime Commission such information as the Commission may deem necessary to establish the financial responsibility of the person arranging, offering, advertising, or providing such transportation, or in lieu thereof a copy of a bond or other security, in such form as the Commission, by rule or regulation, may require and accept, for indemnification of passengers for nonperformance of the transportation.

[2] ACL does not protest the applicability of section 2 of P.L. 89-777 to its operations. Section 2 provides:

Each owner or charterer of an American or foreign vessel having berth or stateroom accommodations for 50 or more passengers, and embarking passengers at United States ports, shall establish, under regulations prescribed by the Federal Maritime Commission his financial responsibility to meet any liability he may incur for death or injury to passengers or other persons on voyages to or from United States ports, in an amount based upon the number of passenger accommodations aboard the vessel.

precludes the application of section 3 of P.L. 89–777 to its operations. It is Petitioner's opinion that its status as an ICC certificated carrier subjects it only to ICC jurisdiction, which Commission has not seen fit to promulgate insurance requirements for carriers by other modes of transportation. Furthermore, ACL argues that, as an ICC carrier, section 33 of the Shipping Act, 1916 (46 U.S.C.A 832) precludes the applicability of section 3 of P.L. 89–777 to its operations. That section provides that the Shipping Act:

> . . . shall not be construed to affect the power or jurisdiction of the Interstate Commerce Commission, nor to confirm upon the [Federal Maritime] board concurrent power or jurisdiction over any *matter* within the power or jurisdiction of such commission; nor shall this Act be construed to apply to intrastate commerce. (Emphasis added)

While ACL acknowledges that P.L. 89–777 was not enacted as part of the Shipping Act, 1916, it nevertheless argues that section 33 of the 1916 Act precludes the application of section 3 of P.L. 89–777 to its operations. ACL takes the position that this Commission's jurisdiction with respect to section 3 is limited by the spirit if not the strict provisions of section 33 of the Shipping Act, 1916.

ACL also argues that because section 3 prohibits a carrier from providing transportation without the required showing of financial responsibility, it is inconsistent with the provisions of 49 U.S.C.A. 905(a), which imposes a duty upon an ICC water carrier to provide transportation. Additionally, ACL argues that passengers who suffer damages for nonperformance are adequately protected by the provisions of 49 U.S.C.A. 908. That section provides for reparation in the event of any illegal act including the failure to do anything required by the Interstate Commerce Act, but it does not require insurance or bond in the event of insolvency.

Hearing Counsel's opinion is that the plain meaning of the language contained in P.L. 89–777 and its legislative history make it evident that Congress intended to include ICC certificated carriers within the provisions of that law and this Commission's jurisdiction.

Hearing Counsel further argue that the provisions of section 33 of the Shipping Act, 1916 do not preclude the application of P.L. 89–777 requirements to ACL. They reason that since P.L. 89–777 was not enacted as part of the Shipping Act, 1916, section 33 of that Act does not apply. Furthermore, it is pointed out that even if P.L. 89–777 were part of the Shipping Act, it would not bar this Commission from regulating ACL since section 33 precludes the exercise of *concurrent* jurisdiction only as to *matter* and not as to persons. Hearing Counsel argue that inasmuch as Part III of the Interstate Commerce Act, 49 U.S.C.A. 901, *et seq.*, which applies solely to water carriers, contains no provision similar to those of section 3 of P.L. 89–777 (or for that matter section 2) there is no conflicting subject matter jurisdiction between the two sister agencies. In this regard, we are reminded that businesses are frequently subject to

regulation by several agencies. We agree with the position advocated by Hearing Counsel and are accordingly denying ACL's petition.

The language of P.L. 89–777 is clear and unambiguous, and leaves no doubt that its provisions apply to *all* vessels which embark passengers at U.S. ports and which have stateroom accommodations for 50 or more persons even if the operations of that vessel otherwise fall within the jurisdiction of the Interstate Commerce Commission. While the legislative history of P.L. 89–777 does not reveal any congressional concern with "jurisdictional overlapping" it does reveal Congress' intent to protect passengers from default by *any passenger vessel* and to avoid evasions of law. U.S. Cong. and Admin. News, 4182 (1966). As originally introduced H.R. 10327, which became P.L. 89–777 applied to "operators of ocean cruises." The House bill defined ocean cruises as "an ocean voyage for hire of passengers, other than common carrier service. . . ." The Se ate rejected the House provision and substituted the present language of P.L. 89–777. In conference, the managers of the House bill in accepting the Senate amendment noted that the House version excluded common carrier service from the provisions of the bill. Therefore, while Congress did not specifically address the matter of "jurisdictional overlapping," the legislative history of P.L. 89–777 evidences a congressional intent to include *all* carriers within its scope, without regard to whether they may be otherwise regulated.

Nor does section 33 of the Shipping Act, 1916 preclude this Commission's exercise of jurisdiction over ACL pursuant to P.L. 89–777. Not only was P.L. 89–777 not enacted as part of the Shipping Act, 1916, but as Hearing Counsel have correctly stated, section 33 only precludes concurrent subject matter jurisdiction. While ACL, as an interstate common carrier by water is subject to Part III of the Interstate Commerce Act, 49 U.S.C.A. 901, *et seq.*, none of its provisions are even similar to the provisions of section 3 of P.L. 89–777 (46 U.S.C.A. 817e).

In *Alabama Great Southern Railroad Company v. Federal Maritime Commission*, 379 F.2d 100 (1967)[3] the United States Court of Appeals for the District of Columbia in resolving a similar issue held:

> Where a person performs functions some of which are subject to regulation under the Shipping Act and others under the Interstate Commerce Act the same person might be subject to the jurisdiction of one or the other Commissions depending on the subject matter to be regulated.

As noted earlier, Part III of the Interstate Commerce Act, to which ACL is subject, does not contain a provision requiring parties subject to that Part to establish financial responsibility for passenger indemnification as required by P.L. 89–777. Accordingly, this Commission in exercising jurisdiction over ACL under that Public Law is in no way exercising concurrent jurisdiction with the ICC. Not only does the Interstate

[3] That businesses are often regulated by several government agencies is further supported by *Greater Baton Rouge Port Commission v. The United States*, 287 F.2d 86 (5th Cir. 1961).

Commerce Act not prohibit carriers subject to it from complying with the rules and regulations of other agencies, but it specifically provides in Part III thereof that:

> Nothing in this chapter shall be construed to affect any law of navigation, the admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or for laws respecting seamen, or any other law, regulation, or custom, not in conflict with the provisions of this chapter. (49 U.S.C.A. 920d).

THEREFORE, IT IS ORDERED, That the Petition for Declaratory Order made subject of this proceeding is denied.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-50

COMMERCIAL SOLVENTS CORPORATION INTERNATIONAL, INC.

v.

MOORE-MCCORMACK LINES, INC.

Complaint dismissed as untimely filed.

William Levenstein for Commercial Solvents Corporation International Inc., Complainant.

J.D. Straton, Jr. for Moore-McCormack Lines, Inc., Respondent.

REPORT

January 4, 1977

(*Karl E. Bakke*, Chairman; *Ashton C. Barrett, Bob Casey*, and *James V. Day*, Commissioners)

BY THE COMMISSION: This proceeding is before the Commission on exceptions from Complainant Commercial Solvents Corporation International, Inc. (CSC) to the Initial Decision of Administrative Law Judge Thomas W. Reilly in which he found that Respondent Moore-McCormack Lines, Inc. collected freight charges in excess of those provided in its tariff on five shipments described in the bills of lading as "Chemicals, NOI[1] (2-Amino—2 Methyl—1 Propanol)," carried by Respondent from New York to Buenos Aires, Argentina. The Presiding Officer issued an Initial Decision awarding reparation in the amount of $165.00, to which CSC excepts. No reply to CSC's exceptions was received.

Before considering the merits of the case the Commission must ascertain that it has the authority to grant the relief requested.

Section 22 of the Act reads in part:

> The board,[2] if the complaint is filed within two years after the cause of action accrued,[3] may direct the payment . . . of full reparation to the complainant. . . .

[1] Not Otherwise Identified.

[2] Federal Maritime Board, predecessor to the Federal Maritime Commission.

[3] A cause of action arises under section 18(b)(3) of the Act either upon delivery of the cargo to the carrier or upon payment of the freight charges whichever is later. *United States of America v. Hellenic Lines Limited*, 14 F.M.C. 255, 260 (1971).

The complaint was filed on November 12, 1975. Freight on the five shipments was prepaid. The date the cargo was delivered to the carrier, as per each bill of lading, is as follows: bill of lading No. 100—November 9, 1973; bills of lading nos. 123, 125, 126 and 128—November 12, 1973.

Starting the count with November 9 and 12, 1973, the last days for filing the complaint were November 8, 1975 with respect to the claim arising under bill of lading no. 100, and November 11, 1975 for the claims arising under bills of lading nos. 123, 125, 126 and 128.

In *CSC International, Inc. v. Waterman Steamship Corp.*, Docket No. 75-31, Order on Remand served October 8, 1976, the Commission waived pursuant to Rule 1(j)[4] the exception in Rule 7(a)[5] so as to make the method of computing time provided therein applicable to the two-year period of section 22. There, the last two days of the period of limitation fell on Saturday and Sunday when the Commission's offices were closed. The Commission determined that under those circumstances rejecting the filing of the complaint on the following Monday as untimely would cause undue hardship which warranted the issuance of a waiver.

However, the undue hardship which must be shown to support a waiver under Rule 1(j), and which was found to exist in *CSC International*, has not been established here. November 11, 1975, fell on a Tuesday, that is, on a day when the Commission's offices were open for business, and while November 8, 1975, fell on a Saturday, applying the rationale of *CSC International* to the claim arising under bill of lading no. 100, the last day for filing would have been Monday, November 10, 1975, and not November 12. Accordingly, we find that the complaint was filed after the expiration of the two-year statutory period provided in section 22 of the Act and must therefore be dismissed.

The disposition of this case renders unnecessary a discussion of the exceptions raised by CSC.

The complaint is dismissed.

Vice Chairman Clarence Morse, concurring and dissenting.

I concur in the result but not for the reasons stated in the majority's report. See my dissent in *CSC International v. Waterman Steamship Corp.*, supra.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

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[4] Rule 1(j) reads in part:

Except to the extent that such waiver would be inconsistent with any statute, any of the rules in this part,. . . may be waived by the Commission or the presiding officer . . . to prevent undue hardship, manifest injustice, or if the expeditious conduct of business so requires. (46 C.F.R. 502.10).

[5] Rule 7(a) of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.101) provides in part:

In computing any period of time under the rules in this part *except § 502.63 (Rule 5(c))*, the time begins with the day following the act, event, or default, and includes the last day of the period. . . (Emphasis added.)

Section 502.63 (Rule 5(c)) refers to the filing of complaints seeking reparation filed under section 22 of the Act.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-27

ABBOTT LABORATORIES

v.

VENEZUELAN LINE

Carrier tariff rule requiring rating as N.O.S. when bill of lading description is by trade name is not applicable where trade name did not appear on bill of lading. Same tariff rule cannot in any event be used to preclude consideration by the Commission of nature of cargo when timely complaint is filed.

Section 18(b)(3) of the Shipping Act, 1916 states it is unlawful for a carrier to assess charges greater, less or different from those specified in its tariff. Unlawfulness does not depend on whether improper assessment was knowing or inadvertent.

Reparation awarded.

William Levenstein for complainant.

G. E. McNamara for respondent.

REPORT

January 5, 1977

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Ashton C. Barrett, James V. Day and Bob Casey, *Commissioners*).

PROCEEDINGS

This proceeding was instituted by a complaint filed by Abbott Laboratories against Venezuelan Line. Complainant alleges that respondent has subjected it to an ocean freight rate which is unjust, unreasonable and in violation of section 18(b)(3) of the Shipping Act, 1916. Administrative Law Judge William Beasley Harris called for a hearing in the matter which was attended only by counsel for the complainant. Respondent's only appearance in the proceeding was in the form of two letters to the Administrative Law Judge.

Initial decision was served November 11, 1975, wherein the Administrative Law Judge determined that the claim for reparations should be denied. The matter is before us on exceptions to the initial decision.

FACTS

Complainant is a corporation incorporated in the State of Illinois and its principal business is marketing of chemicals, drugs, medicines, pharmaceuticals and products similar and related thereto. Respondent is a common carrier by water engaged in transportation of cargo between U. S. Atlantic and Gulf Ports and Ports in Venezuela and Netherland Antilles and as such is subject to the provisions of the Shipping Act.

The complaint seeks recovery of overcharges on six shipments from Baltimore to La Guaira, which were transported during the period of August through December 1973. The cargo in question was described on the bill of lading as "Raw Drugs." Respondent applied the rate applicable to "Drugs, Harmless."[1] Complainant seeks to have the rate for "Dextrose" applied to these shipments.

In support of its claim complainant has submitted for each shipment copies of the bill of lading, export declaration, and Abbott Laboratories invoices and packing lists. For each shipment the export declaration describes the commodities in question either as "Cerelose Powder," or "Cerelose Powder Anhydrous Dextrose" with a Schedule B Commodity No. of 061.9010. The Commerce Department Schedule B listing for No. 061.9010 is "Dextrose." Complainant has also provided a chemical dictionary extract which defines "Cerelose" as a trademark for a white, crystallized, refined dextrose.

Complainant originally submitted the claim to respondent through a freight auditing company. The freight auditing company sought to have the "Raw Drugs" description changed to "Cerelose Powder Dextrose" and also sought to have the billing for the shipment changed so that the rate on dextrose would be applied.

Respondent denied these claims for overcharge on the basis of Item 2(n) of its tariff which reads as follows:

> "(n) Bills of lading describing articles by trade name are not acceptable for commodity rating. Shippers are required to describe their merchandise by its common name to conform to merchandise descriptions herein. Bills of lading reflecting only trade names will be automatically subject to application of the rate specified herein for Cargo N.O.S. as minimum."

In reply to the complaint before the Commission, respondent acknowledged that the product shipped, "Cerelose," is indeed dextrose and, had the bill of lading described the true nature of the commodity being shipped, it would have been rated in accordance with the tariff. Respondent then states that allegations of complainant that an unlawful rate was assessed are refuted by the fact that the charges were based on bills of lading prepared by and submitted by complainant, a well-known firm which reasonably may be judged qualified to determine the correct nature of the items proffered for shipment.

[1] U. S. Atlantic and Gulf Venezuela and Netherlands Antilles Conference Tariff No. VEN-11, FMC-2.

DISCUSSION

The presiding Administrative Law Judge denied the claim in question based on the proposition that the carrier has the right to expect the shipper will properly identify the shipment. He concluded that "allowing an error as to Raw Drugs on the bills of lading, the use of the trade name Cerelose on the requests for correction entitled recognition of that trade name and the application of the tariff rate."

Complainant has excepted to the conclusions of the Administrative Law Judge. Complainant suggests that the Administrative Law Judge's reliance on Item 2(n) as a basis for denial of the claim is wrong. We agree. Item 2(n) provides how bills of lading will be rated by the carrier if the bill of lading describes articles by trade name. The bill of lading in this case did not describe the article by trade name but described it as "Raw Drugs." Complainant did, however, refer to the trade name of the commodity in later seeking to prove its exact composition; i.e. to show the carrier that Cerelose Powder is a trade name for dextrose. This, however, does not bring the trade name rule into play. Inasmuch as the trade name rule only governs rating of cargo based on description in *bills of lading* it could have no application to this proceeding. Additionally, we have recently reaffirmed the proposition that trade name rules govern only the rating of cargo by the carrier at the time of shipment and cannot be invoked as a bar to a later showing in a proper proceeding before the Commission as to the exact nature of the commodity shipped. *The Carborundum Company v. Royal Netherlands Steamship Co., Docket 75–15 Report served January 5, 1977.*

As indicated above the Administrative Law Judge also supports his denial of the claim on the proposition that the carrier has a right to expect the shipper will properly identify the shipment. The Administrative Law Judge cites *Ocean Freight Consultants Inc. v. Italpacific Line*, 15 FMC 314, 319 (1972) to support this conclusion. While we cannot quarrel with this general proposition it should be noted that the *Ocean Freight Consultant's* case itself qualifies this proposition by stating that the shipper similarly has the right to expect the carrier to charge the proper rate for the actual goods carried and that where a mistake occurs the party who commits it has the heavy burden of proof to support a claim for rectification.

Inasmuch as there is no technical bar to consideration of the claim on its merits we turn then to the question of whether complainant, who erred in describing the shipment, has proven that the commodity in question qualifies for the tariff rate applicable to dextrose. It is clear from the documentation submitted that the shipments in question were of Cerelose powder. It has also been amply demonstrated that Cerelose Powder is in fact a form of dextrose. Respondent has in fact admitted in a letter to the Administrative Law Judge that "technical data received from the company reveals beyond doubt that Cerelose is indeed dextrose."

It is concluded from the evidence of record that complainant has sufficiently demonstrated that an overcharge occurred on these shipments. Respondent suggests, however, that it should not be found to have collected unlawful charges when the rate it assessed was based on information supplied by the party most informed about the nature of the commodity. The fact that respondent relied on information submitted by a "knowledgeable" shipper does not detract from the conclusion that a misrating occurred. Section 18(b)(3) of the Shipping Act, 1916, prohibits a carrier from assessing a charge greater, less or different than the rates specified in its tariff for a particular commodity or service. This section does not distinguish between knowing and inadvertent misratings. Either type is unlawful. Whether or not an unlawful charge is assessed knowingly may be a matter for consideration in determining whether to seek penalties for a violation but not in determining whether a violation occurred.

It is ordered that reparation in the amount of $1,396.56 be awarded complainant as a result of the overcharges found in this proceeding to have been assessed.

Vice Chairman Morse, concurring and dissenting.

I concur in the report in respect to the finding and conclusion that the tariff trade-name rule was inapplicable because the shipment was not described by trade name in the bill of lading. Hence, this case is one only of determining under which tariff commodity description the shipment properly falls.

I dissent as to the balance of the report on the basis of my dissenting opinion in Docket No. 75–15, *The Carborundum Company v. Royal Netherlands Steamship Company (Antilles) N. V.*

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-27

ABBOTT LABORATORIES

v.

VENEZUELAN LINE

ORDER

The Federal Maritime Commission has this day served its Report in subject proceeding, which we hereby incorporate herein, in which we found that an inapplicable rate had been assessed for complainant's shipment.

Therefore for the reasons enunciated in the Report it is ordered that respondent Venezuelan Line be required to refund to complainant Abbott Laboratories the amount of overcharges in the sum of $1,396.56 with interest at six percent per annum if not paid within thirty days from the date of this Order.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75–15

THE CARBORUNDUM COMPANY

v.

ROYAL NETHERLANDS STEAMSHIP COMPANY (ANTILLES) N.V.

Question of applicability of Commission's *Kraft* decision to case seeking change in description of commodity declared on bill of lading need not be determined in view of Court of Appeals vacation of Commission decision in *Kraft*.

Carrier tariff rule requiring rating as N.O.S. when bill of lading description is by trade name is not applicable where trade name did not appear in bill of lading. Same tariff rule cannot in any event be used to preclude consideration by the Commission of nature of cargo when claim is filed.

Burden of proof is met where affirmative evidence is not refuted due to respondents failure to answer or otherwise appear.

Reparation awarded.

Harrison A. Harrington, Manager-Traffic, The Carborundum Company; attorney *William Levenstein* for complainant.

No response by or appearance for respondent.

REPORT

January 5, 1977

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Ashton C. Barrett and James V. Day, *Commissioners*.)*

PROCEEDINGS

This proceeding was instituted by a complaint filed by The Carborundum Company against Royal Netherlands Steamship Company (Antilles) N. V. Complainant alleges that respondent has subjected it to an ocean freight rate which is unjust and unreasonable and in violation of section 18(b)(3) of the Shipping Act, 1916. Respondent neither answered the complaint nor otherwise pleaded or appeared. Administrative Law Judge William Beasley Harris called for a hearing in the matter which was attended only by counsel for complainant. Complainant moved for judgment on the pleadings. Motion was denied. Complainant elected to

*Commissioner Bob Casey not participating.

stand on the matters already submitted, presented no witnesses, and opted for no brief.

Initial decision was served by the Administrative Law Judge on August 19, 1975, wherein he determined that the claim for reparation should be denied. The matter is before us on exceptions to the initial decision.

FACTS

Complainant is incorporated in Delaware with its place of business in Niagara Falls, New York. Its principal business is marketing abrasives, refractories, electronics and related products.

Respondent is a common carrier by water engaged in transportation between New York, New York and Kingston, Jamaica and as such is subject to the provisions of the Shipping Act, 1916.

Complainant shipped the cargo in question on October 14, 1974, under Respondent's bill of lading no. 147 for shipment from New York, New York to Kingston, Jamaica. The shipment is described in this bill of lading as "Drums: Silicon Carbide, Crude, Fused." The Respondent classified the shipment as Chemicals, N.O.S., Class 2 and assessed a rate of $99.00 per 2,000 lbs.[1]

Ocean Freight Consultants, Inc. (O.F.C.), on behalf of Complainant, filed a claim with Respondent dated December 24, 1974. In this claim, O.F.C. requested that the Respondent correct the freight classification by amending the bill of lading description to read "Abrasive Grain" and refund the difference between the Chemicals, N.O.S. rate of $99.00 per 2,000 lbs. and the abrasive grain rate of $70.00 per 2,000 lbs.[2] Respondent denied the claim stating that the bill of lading description controls the applicable rate. O.F.C. replied to the denial by letter, asserting that its claim on the Complainant's behalf was improperly denied and offered to submit Form 7403, a U. S. Department of Commerce and U. S. Customs form used for correcting descriptions on the Export Declaration. In this letter, O.F.C. referred to the Chemical Dictionary definition of "Silicon Carbide" which lists as its "uses": "Abrasive for cutting and grinding metals; grinding wheels; refractory in nonferrous metallurgy, ceramic industry, and boiler furnaces," and cross referenced "Carborundum," which is defined as a "Trademark for abrasives and refractories of silicon carbide, fused alumina and other materials."

Respondent again denied the claim and in so doing relied on Item No. 116, page 13–3 of the U. S. Atlantic & Gulf-Jamaica Conference tariff, which reads:

[1] U. S. Atlantic and Gulf Jamaica Conference Tariff No. JAM–8, 13th revised page 46, F.M.C. No. 1.
[2] Conference Tariff No. JAM–8, 9th revised, page 55.

(a) Claims by shippers for adjustment of freight charges will be considered only when submitted in writing to the carrier within six months of date of shipment. Adjustment of freight based on alleged error in weight, measurement, or description will be declined unless application is submitted in writing sufficiently in advance to permit reweighing, remeasuring, or verification of description, before the cargo leaves the carrier's possession, any expense incurred to be borne by the party responsible for the error or by the applicant if no error is found.

On May 6, 1975, Carborundum filed this complaint with the Commission.

The complaint includes the above-mentioned information regarding the nature of the cargo. Additionally, the complaint includes a copy of a January 21, 1975 letter from complainant to O.F.C. transmitting respondent's invoice for the shipment in question. In this letter complainant states:

The commodity covered by this bill of lading is Silicon Carbide Abrasive Grains. This material is not to be confused with Silicon Carbide, Fused, Crude as the crude material, in itself, is not synonymous with Silicon Carbide, except that Aluminum Oxide, like Silicon Carbide, may be either "crude" or "in grains". Again, the material in this shipment was Silicon Carbide Abrasive Grains and we must concur with your claim for reclassification as "Abrasive Grain".

The attached invoice is dated September 27, 1973, lists as consignee Gore Bros. Ltd. of Half-Way-Tree, Jamaica, and describes the shipment as 77 drums of "Sic Grain" to be shipped per shipment # 09443. Bill of Lading No. 147 covering the shipment also refers to shipment #09443 and lists Gore Bros. Ltd. under the heading "Address arrival notice to."

DISCUSSION

The presiding Administrative Law Judge denied the claim in question both on the basis of respondent's tariff rules and on the basis of failure to meet the burden of proof.

The Administrative Law Judge found the claim should be denied because the claim is based on a change in description of commodity shipped and respondent's tariff Rule 116 quoted above prohibits adjustment in rates based on error in description unless the request for adjustment is brought prior to the cargo leaving the carrier's possession. The Administrative Law Judge discusses at some length complainant's contention that this claim does not involve a change in description but merely involves a question of which tariff item more properly applies to the given description. The Administrative Law Judge also discusses whether the Commission's decision in *Kraft Foods* v. *Moore McCormack Lines, Inc., 17 FMC 320 (1974)* is applicable and whether it would preclude recovery here. In *Kraft* the Commission had found that a tariff rule similar to Rule 116 would preclude recovery of a claim which was based on alleged error in "weight or measurement". The Administrative Law Judge found that the import of *Kraft* was such that it should logically be extended to also prohibit adjustments based on error in "description" where the tariff rule specifies that "weight measurement and description"

claims must be brought prior to shipment leaving the custody of the carrier.

The U. S. Court of Appeals for the District of Columbia Circuit has recently rendered an opinion vacating our order in *Kraft;* see *Kraft Foods v. FMC*, decided July 13, 1976. The Court has stated that a provision virtually identical to Rule 116 is not a valid tariff provision inasmuch as it sets up a period of limitation for consideration of a claim before the Commission which infringes on the rights granted by section 22 of the Shipping Act. In view of the Court's opinion in *Kraft* it is not necessary for us to consider whether our earlier decision in *Kraft* should be interpreted to cover changes in "description". It is clear from the Court's opinion that such a rule cannot act as a bar to our consideration of the claim on its merits.

The Administrative Law Judge also found that the claim should be denied because of the existence in respondent's tariff of Item 10(h) which provides:

> Bills of lading describing articles by trade names are not acceptable for commodity ratings. Shippers are required to describe their merchandise by its common name, to conform to merchandise description appearing herein. Bills of lading reflecting only trade names will be automatically subject to application of the rate specified herein for Cargo N.O.S. as minimum.

The Administrative Law Judge found that Item 10(h) is a lawful tariff rule applicable to rating bills of lading which reflect only trade names. He further found that since it is now contended by complainant that Silicon Carbide is a "Carborundum", a trademark of complainant, then, without more, the shipment is found to come under Item 10(h) of the tariff and to have warranted N.O.S. rating.

Complainant on exception correctly points out that Item 10(h) has absolutely nothing to do with this case. The shipment was described on the bill of lading as "Silicon Carbide", not as a Carborundum.Silicon Carbide is not a trade name, but is the common name for the article shipped. Item 10(h), by its own wording, can only be invoked when an article was described on the *bill of lading* by trade name (Emphasis ours). Accordingly, the Administrative Law Judge was in error in basing a denial of the claim on Item 10(h).

Further comment on Item 10(h) is appropriate in view of the Court's opinion in *Kraft*. As indicated above, the Court in *Kraft* determined that a tariff rule which in effect infringes on the rights granted by section 22 of the Act is invalid insofar as it governs filing of claims before the Commission. The rule in *Kraft*, did not by its language prevent the filing of a claim for reparation but did require claims to be rejected unless filed before the shipment left the custody of the carrier. The Court found that under such circumstances the right to file a claim becomes illusory once the carrier has delivered the shipment. Similarly, Item 19(h), if literally enforced, would make the right to file a claim illusory. Item 10(h) requires cargo described by trade name to be rated as Cargo N.O.S. Literally

enforced no further examination into the nature of the cargo would be permitted once the shipment is delivered, and no claim for adjustment of the rate to a more applicable specific commodity tariff item could be considered. Such a rule if used before the Commission to automatically defeat a claim, like the rule in *Kraft* infringes on the rights granted by section 22 of the Shipping Act to have claims considered which are brought within two years. Accordingly, we think an Item 10(h) type provision should be treated just as the *Kraft* rule provisions; i.e. claims cannot be defeated by simple reference to the rule but must be determined on the basis of the evidence as to the true nature of the cargo. If the evidence shows that a more specific tariff item fits the commodity shipped, claimant is entitled to be rated under that item. Logic, fairness, and the message of *Kraft* so require.[3]

Much is made by carriers and their representatives, however, that rules of this type are reasonable attempts to require diligence on the part of a shipper or his representatives in describing the cargo on the bill of lading. This was exactly our earlier position in *Kraft*. We have also stated in the past that a carrier has a right to expect that a shipper will properly describe his cargo. So too we have stated that the shipper has the right to expect the carrier to charge the proper rate for the type of goods actually carried.[4] However, the fact remains that even assuming good-faith effort on the part of both parties mistakes will be made and shippers will seek to bring claims before the Commission. The law specifically permits filing of such claims and the Court of Appeals in *Kraft* has specifically pointed out the previous error of our ways and has shown that a tariff provision, however well-intended, cannot be used to defeat that right to have a claim considered if brought within the statutory period of limitation.

The Commission has previously refused on other grounds to allow trade name rules of this nature to be invoked as a bar to Commission consideration of a claim. In *Ocean Freight Consultants v. Royal Netherlands Steamship Company*, 14 S.R.R. 1485 (1975) a majority of the Commission found a 10(h) type provision unenforceable inasmuch as it requires bills of lading using trade names to be rated as Cargo N.O.S. "as minimum". The "as minimum" provision was found to allow a standard which was too flexible and which presented the opportunity for discrimination between shippers.[5]

We now turn to the question of whether complainant has satisfied its burden of proof in this proceeding. We think it has. The Administrative Law Judge's decision to the contrary does not discuss the specific elements of proof presented by complainant. Rather the Administrative Law Judge's conclusion is based on a discussion of equities regarding size

[3] Rules of tariff construction also require that the more specific of two possible applicable tariff items must apply. *Corn Products Company v. Hamburg-Amerika Lines*, 10 FMC 388 (1967).

[4] *Ocean Freight Consultants v. Italpacific Line*, 15 FMC 314 (1972).

[5] See also *Abbott Laboratories v. Prudential Grace Lines*, 17 FMC 186 (1973) for the proposition that under the language of such rules the bill of lading should not have been "accepted" by the carrier, and having accepted it the carrier cannot later complain.

and experience of shipper and frequency of shipments made. These considerations have nothing to do with proof of the nature of the commodity shipped, and in any event the Commission has previously disavowed equity theories regarding overcharge claims.[6]

The evidence shows that Silicon Carbide was shipped. The bill of lading so states and further indicates that it was "crude, fused". Complainant's letter of January 21, 1975 to O.F.C. suggests that the commodity covered by the bill of lading was "silicon carbide abrasive grains" and is not to be confused with "silicon carbide, fused crude". The letter further stresses that silicon carbide may be either "crude" or "in grains" but that this shipment was an "abrasive grain".[7] Complainant's invoice substantiates the contention that the shipment consisted of silicon grain. Chemical dictionary provisions establish that the granular forms of silicon carbide are in fact abrasives. It is concluded therefore that the shipment in question consisted of silicon carbide abrasive grain and is entitled to be rated under respondent's tariff provision "Grain, Abrasive". We think complainant has carried its burden under any standard of proof, especially inasmuch as respondent failed to answer, plead or otherwise appear throughout the course of the proceeding.[8]

Having determined that the shipment in question consisted of abrasive grains, the applicable charges should be computed at the rate specified therefor. Complainant suggests that reparation in the amount of $402.04 is due based on an applicable rate of $70 per 2,000 lbs. Respondent's tariff however indicates that this rate is applicable only to volume shipments which are defined as those in minimum lots of 21 measurement tons or 14 weight tons. The shipment in question consisted of 27,920 lbs. which is less than 14 weight tons and 348 cu. ft. which is less than 21 measurement tons. Accordingly, the shipment does not qualify for the volume rate. Rather it must be rated at the less volume rate for this commodity which is $83.50 per 2,000 lbs. Based on the applicable rate, the proper charge for the shipment including bunker surcharge and L and L charge totals $1,278.18. This represents a difference of $216.38 from the total actually assessed ($1,494.56).

Accordingly, complainant is entitled to reparation in the amount of $216.38. It is so ordered.

Vice Chairman Clarence Morse dissenting. I dissent. In my opinion, *Kraft* (CA–DC, 1976) is not controlling.

Tariffs frequently contain rules describing how shipments shall be described and providing penalties (higher rates) for failing to describe the shipment according to tariff commodity descriptions.

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[6] *Union Carbide Interamerica v. Venezuelan Line*, 17 FMC 181 (1973).

[7] Complainant's letter completely refutes its own contention that this claim does not involve a change in description. "Crude" and "in grains" are different types of silicon carbide and a change from one to the other certainly involves a change in description. In view of our disposition of this case this self-refutation is not fatal to complainant's case.

[8] See Rule 5 d (46 CFR 502.64) of the Commission's Rules of Practice which states that in the event respondent should fail to file and serve an answer, the Commission may enter such rule or order as may be just. Accordingly, complainant's allegations of fact may be deemed to be established.

The "trade name" rule[9] in this tariff is such a rule. These rules serve to establish two lawful rates for a shipment, one being the commodity rate when the shipment is described to match the tariff commodity description, and the second being the N.O.S. rate when the shipment is described in the bill of lading by trade name. In principle this is no different than a tariff rule which provides a given rate for a palletized shipment and a higher rate for the identical shipment if shipped not palletized. In each case the shipper has an option, in the one case as to the manner in which he describes his goods (by tariff commodity description or by trade name), and in the second case as to the method he chooses to make his shipment (palletized or not palletized). Having exercised his option the rate thereby applicable according to the tariff rules is the only lawful rate.

Let us consider another example—high valued cargo. Tariffs usually provide two rates for high valued shipments, one being a rate of, say, $50 W/M with a ceiling legal liability of $500 per package or the declared value whichever is the higher (46 U.S.C. 1304(5)). Assume a situation where a shipper makes a shipment and declares its true nature and value and therefore is charged a freight rate computed on the $50 W/M plus 5% of the declared value. Assume that the shipment is made and the goods are delivered at destination in sound condition. Assume that thereafter the shipper comes to us and asserts his shipping clerk or freight forwarder made a mistake in declaring the nature and value of the goods, for it was the shipper's initial intention to ship under the flat $50 W/M rate basis. Surely the majority would not hold it is a violation of the Shipping Act, 1916, for the carrier now to refuse to permit the shipper to retroactively amend his description of the shipment and, upon the carrier's refusal, order reparations in an amount reflecting the difference between the $50 W/M rate and the $50 W/M plus 5% of the declared value rate. Here, again, the tariff provided two options to the shipper, and having exercised his option, the shipper is bound by that election. In principle there is no difference between the foregoing example and the trade-name rule.

In my opinion these are valid, lawful rules and assure proper rating of shipments.

The effect of the majority's decision, absent (perhaps) fraud on the part of the shipper, is that despite such tariff rules and no matter how carelessly the shipper describes his goods to the carrier, the shipper can come to this Commission, prove that what was actually shipped (but described to the carrier, for example, by its trade name) when properly described matched a lower-rated tariff commodity description, and obtain a reparation award. Such a holding will provide little or no incentive to shippers or their freight forwarders to properly conduct their shipping activities.

In my opinion, absent a finding by us that the tariff rule (trade-name

[9] See Footnote [4], *supra*.

rule as an example) is unlawful, the majority decision is contrary to the intent and plain language of section 18(b)(3), Shipping Act, 1916, which directs that a carrier shall charge ". . . the rates and charges which are specified in its tariff on file with the Commission and duly published and in effect at the time". The trade-name rule and its derivative rate squarely fit that statutory directive.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-15

THE CARBORUNDUM COMPANY

v.

ROYAL NETHERLANDS STEAMSHIP COMPANY (ANTILLES) N.V.

ORDER

The Federal Maritime Commission has this day served its Report in subject proceeding, which we hereby incorporate herein, in which we found that an inapplicable rate had been assessed for complainant's shipment.

Therefore for the reasons enunciated in the Report it is ordered that respondent Royal Netherlands Steamship Company (Antilles) N.V. be required to refund to complainant The Carborundum Company the amount of overcharges in the sum of $216.38, with interest at six percent per annum if not paid within thirty days from the date of this Order.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-35

AGREEMENT NO. T-1685, AS AMENDED, AND T-1685-6: BETWEEN THE CITY OF ANCHORAGE AND SEA-LAND SERVICE, INC.; AND AGREEMENT NO. T-3130: BETWEEN THE CITY OF ANCHORAGE AND TOTEM OCEAN TRAILER EXPRESS, INC.

Agreement Nos. T-1685, as amended by T-1685-6, and T-3130, as submitted, are ambiguous, and cannot be approved until the parties modify the agreements to clarify the ambiguous language.

Agreement Nos. T-1685, as amended by T-1685-6, and T-3130 should be modified to ensure that Coastal Barge Lines, Inc. has sufficient terminal space available to it for cement discharging operations.

Agreement No. T-3130 should be modified to provide that Tote will have one preferential call per week at Anchorage except under certain specified emergency situations.

Agreement Nos T-1685, as amended by T-1685-6, and T-3130, as modified, are not unjustly discriminatory or unfair as between carriers, shippers, exporters or importers, nor operate to the detriment of the commerce of the United States, nor are they contrary to the public interest or otherwise in violation of the Shipping Act, 1916.

Totem Trailer Express, Inc. and the City of Anchorage have violated section 15 through implementation of Agreement No. T-3130 prior to approval.

Violation of section 15 by construction and use of trestles prior to approval does not, in itself, warrant disapproval of Agreement No. T-3130.

Leases to certain back-up areas are not subject to section 15.

Environmental issues in this proceeding do not constitute a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

Peter J. Nickles and *John Michael Clear* for The City of Anchorage, Respondent.

Gerald A. Malia and *Edward A. McDermott, Jr.* for Sea-Land Service, Inc., Respondent.

Stanley O. Sher, Jacob P. Billig and *David Shonka* for Totem Ocean Trailer Express, Inc., Respondent.

James E. Wesner for Tesoro-Alaskan Petroleum Corporation, Petitioner.

Alan F. Wohlstetter and *Edward A. Ryan* for Coastal Barge Lines, Inc., Petitioner.

John Robert Ewers and *Joseph B. Slunt,* Hearing Counsel.

REPORT

January 6, 1977

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Ashton C. Barrett, Bob Casey and James V. Day, *Commissioners*)

By Order of Investigation and Hearing dated September 15, 1975, the Commission instituted this proceeding to determine: (1) whether terminal Agreement No. T–3130, between Totem Ocean Trailer Express, Inc. (Tote) and the City of Anchorage, Alaska (Anchorage) and terminal Agreement Nos. T–1685, as amended, and T–1685–6, between Sea-Land Service, Inc. (Sea-Land) and Anchorage are unjustly discriminatory or unfair as between carriers, shippers, exporters or importers or operate to the detriment of the commerce of the United States or are contrary to the public interest or are otherwise in violation of the Shipping Act, 1916, within the meaning of section 15 of that Act; (2) whether said agreements should be approved, disapproved, or modified pursuant to section 15; and (3) whether section 15 has been violated by Tote and/or Anchorage by the construction of facilities provided for in Agreement No. T–3130 prior to the approval of said agreement by the Commission.

The Commission's Order of Investigation named Anchorage, Sea-Land and Tote as Respondents. Standard Oil Company of California, Western Operations, Inc.; Coastal Barge Lines, Inc. (Coastal); Puget Sound Tug and Barge Company; Tesoro Alaskan Petroleum Corporation (Tesoro);[1] and Shell Oil Company were made Petitioners in the proceeding.[2] Hearing Counsel also participated in the proceeding.

On January 30, 1976, the Commission issued an Interim Order disapproving Agreement No. T–1685, as amended through T–1685–6, effective February 5, 1976, unless the parties on or prior to that date filed an amendment suspending Sea-Land's preferential berthing rights during the months of February, March and April 1976. The need for such interim action stemmed from the fact that severe winter conditions at Anchorage posed a risk to Tote's vessel and crew at certain terminal facilities and that the only "safe" berthing areas were assigned to Sea-Land under the terms of its existing preferential berthing agreement with Anchorage. The parties failed to submit such a modification and Sea-Land's basic Agreement No. T–1685, as amended, was disapproved by the Commission.[3] The net effect of the Commission's interim decision was to plac both Sea-Land and Tote on an equal footing with respect to their operations at Anchorage, *i.e.*, on a first-come, first-served basis.

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[1] Tesoro, an active and vigorous opponent against approval of both agreements, advised the Commission on November 3, 1976 that it no longer has an interest in the matters at issue in this proceeding.

[2] Standard Oil Company subsequently withdrew its protest and was dismissed from the proceeding. Shell Oil Company and Puget Sound Tug and Barge Company did not actively participate in the hearing.

[3] Since Agreement No. T–1685–6 does not stand alone but can only be considered as an integral part of the agreement which it amends, we consider the basic Agreement No. T–1685, as amended through T–1685–6 to be now before us for approval.

BACKGROUND

Anchorage's port facility consist of a single linear pier approximately 2200 feet in length divided into two-and-a-half cargo terminals and a Petroleum Off-Loading (POL) terminal.[4] The POL facility at the southern end of the pier consists of a 196-foot mooring dolphin, a 179-foot petroleum off-loading dock and a 237-foot bridge connecting this structure with Terminal 1. The POL terminal has four manifold connections for the transfer of petroleum.

Adjoining the POL facility is Terminal 1 which is 600 feet long and 47 feet wide. Terminal 1 has two manifold connections for the transfer of pertroleum. Between Terminals 1 and 2 are headers which are used for the receipt of bulk cement. These headers are used in the summer months by Coastal's cement barge which occupies approximately 440 feet of Terminal 2 when it is engaged in off-loading cement.

Terminal 2 is 610 feet long and 69 feet wide. It has no facilities for either off-loading petroleum products or bulk cement.

Terminal 3 is presently 366 feet long, however, there is a capital improvement plan underway whcih would extend Terminal 3 an additional 325 feet. Contracts have been let for the completion of Terminal 3, construction of Trestle No. 3, and a new Transit Area C immediately behind the terminal. This work is proposed to be completed by October, 1976. Anchorage is also planning a further northward extension of Terminal 3 and construction of additional trestles at that facility. It is anticipated that this expansion will be completed by October, 1978, although it could be completed as early as October, 1977 if Anchorage's construction schedules were accelerated.

Sea-Land has been serving Anchorage under a preferential berthing agreement since 1964. Currently, Sea-Land has four vessels in regular service with a fifth added in the summer to accommodate the heavier traffic. Sea-Land operates container vessels which are not suited to carrying outsized cargoes such as mobile homes which Tote will be able to transport on its vessel. Pursuant to Agreement No. T–1685–5 Sea-Land had preferential berthing rights at Terminal 1 for 104 calls per agreement year. Agreement No. T–1685–6, placed at issue in this proceeding, would shift Sea-Land's preferential berthing rights to Terminal 2 and increase its preferential calls from 104 to 156 calls per year. In addition, that agreement permits Sea-Land an additional 50 feet extending northward into Terminal 3 if it introduces larger vessels in the trade and establishes a need for the additional space.

Tote has initiated a regularly scheduled year-round water carrier service between Seattle and Anchorage in direct competition with Sea-Land. Tote's vessel, the *S. S. Great Land,* is a 790-foot long Ro-Ro vessel which requires about one-and-a-half of the Port's berths as well as special ramps and shore facilities to load and discharge its cargo efficiently.

[4] See Appendix for a sketch of the physical layout of the areas under discussion.

Agreement No. T–3130 allows Tote preferential berthing at the POL/ Terminal 1 location for 52 calls per year and also provides Tote with preferential rights to Transit Area B for 5 days per voyage.

POSITION OF THE PARTIES BEFORE THE PRESIDING OFFICER

Anchorage which owns, and through its Port, operates the Anchorage City Dock, requests approval of both Agreement Nos. T1685–6 and T–3130.

Tote requests approval of its own Agreement No. T–3130 and does not oppose Agreement No. T–1685–6. However, Tote opposes any approval of Agreement No. T–1685–6 without concurrent approval of its own agreement.

Sea-Land seeks approval of Agreement No. T–1685–6 but protests any approval of Agreement No. T–3130 on the grounds that it will increase land and water congestion at the Port, deprive Sea-Land of back-up areas, and because it was implemented prior to Commission approval in violation of section 15.

Coastal originally protested both agreements on the ground that it would not have access to cement headers located between Terminals 1 and 2 if Sea-Land was to occupy Terminal 2 and Tote Terminal 1. During the course of the proceeding an accommodation was reached between Sea-Land, Tote and Coastal with the concurrence of Anchorage, which would permit the simultaneous berthing of all three carriers at Anchorage. A further accommodation between Tote and Coastal would allow Coastal preferential use of a portion of Transit Area B.

Tesoro opposes approval of both agreements principally on the grounds that Tote's utilization of the POL/Terminal 1 location will not increase the availability of the facility to petroleum carriers as indicated by the proponents of the agreements; that neither Sea-Land nor Tote has demonstrated a serious transportation need to justify their preferences at the two facilities; and that Tote and Anchorage have violated section 15 by implementation of Agreement No. T–3130 prior to approval.

Hearing Counsel support approval of both agreements only if modifications are made in the agreements to clarify certain problem areas raised during the proceeding. These are: (1) the charges that would apply if the number of preferential voyages allowed under each agreement is exceeded; (2) the emergency powers of the Port Director; (3) the Coastal accommodation; (4) a firm commitment that Tote will be moved when Terminal 3 is completed; and (5) improvements in the petroleum handling capability of Terminal 1. In addition, Hearing Counsel is of the opinion that Tote and Anchorage have violated section 15 through prior implementation of Agreement No. T–3130 and that leases to certain back-up areas are possible section 15 agreements which should be filed for determination.

DISCUSSION

In his Initial Decision the Presiding Officer concluded that:

(1) Agreement Nos. T–1685, as amended, T–1685–6 and T–3130 are not unjustly discriminatory or unfair as between carriers, shippers, exporters or importers, nor operate to the detriment of the commerce of the United States, nor are they contrary to the public interest or otherwise in violation of the Shipping Act, 1916.

(2) Agreement Nos. T–1685, as amended, T–1685–6 and T–3130should be modified and, as modified, approved.

(3) Tote and the City of Anchorage have violated section 15 by construction and use of facilities at Anchorage without submission to and prior approval by the Commission of an agreement for construction of facilities at Anchorage.

(4) Violation of section 15 by construction and use of trestles prior to approval does not, in itself, warrant disapproval of Agreement No. T–3130.

In so holding, the Presiding Officer found, *inter alia*, as follows:

(1) The modifications of the agreements are necessary to clarify that annual tonnage fees are applicable only against the specified number of annual preferential calls set forth in the agreements; that the Port Director may suspend preferential berthing rights when Port and vessel safety so necessitate; that space will be made available in Transit Area B for parking mobile homes; that space be available for off-loading cement; and that certain improvements be made for off-loading petroleum products.

(2) A serious transportation need exists for year-round general cargo waterborne service into the Port of Anchorage.

(3) A serious and important public interest exists in the transportation service offered by Sea-Land and Tote.

(4) Preferential berthing rights are vital to the proper performance of the services offered by Sea-Land and Tote to meet the transportation need of the Port and to serve the public interest.

(5) The agreements, taken together, have a pro-competitive effect.

(6)Neither agreement, as modified, will materially affect the operations of other users of the Port.

(7) The "random" theory in determining the probabilities of congestion at the Port is not applicable to regularly scheduled arrivals.

(8) The limited facilities at the Port warrant approval of these preferential use agreements to assist in attaining a more effective utilization of the Port.

(9) The preferential use agreements will help reduce delays to Sea-Land and Tote thereby reducing costs of their operation and aiding in maintaining regular schedules.

(10) Any delays to other carriers caused by preferential use of berths by Sea-Land and Tote are not likely to be material or result in substantial increase in costs to such other carriers.

(11) Leases of back-up areas, except Transit Area B, are not secton 15 agreements.

Finally, the Presiding Officer determined that the planned construction in the near future of a pipeline will materially reduce utilization of petroleum off-loading facilities and this, coupled with improved facilities for petroleum off-loading, will help relieve any delay in use of petroleum off-loading facilities which may be occasioned by the berthing of Tote's vessel.

Exceptions were filed by all the active participants in the proceeding. The positions of the parties on major findings and conclusions reached by the Presiding Officer in his Initial Decision are discussed below.

A. Modification and Approval of Agreement T-1685-6[5]

Sea-Land takes issue with the Presiding Officer's determination that:

> [T]he annual tonnage fees are applicable only against the specified number of annual preferential calls set forth in the agreement. Any calls during such year which exceed the number set forth in the agreement are otherwise deemed within the agreement but the fees for such calls shall be as otherwise set forth in the Port tariff.

Despite the Presiding Officer's finding that the proposed modification would have no bearing on any prior understanding of the parties, Sea-Land submits that the modification will affect and possibly prejudice a dispute between Sea-Land and Anchorage now pending before this Commission in Docket Nos. 75-48—*Sea-Land Service, Inc. v. The City of Anchorage, Alaska and Totem Ocean Trailer Express, Inc.* and 76-4—*The City of Anchorage, Alaska v. Sea-Land Service, Inc.*[6]

It is our opinion that the Presiding Officer's interpretation of the tonnage fees clause must be set aside. We find little support in the record for the Presiding Officer's interpretation that any calls in excess of the preferential number will be at the tariff rate. We also consider any ambiguity in a newly filed agreement a matter to be resolved by the parties to that agreement prior to any approval by this Commission.[7]

An ambiguity does exist in both agreements. There is no agreement between the parties as to what charges are to be paid once the preferential calls provided in the agreements are exceeded. In fact, and as heretofore indicated, Sea-Land and Anchorage are presently litigating this very issue before the Commission in other proceedings. We cannot approve the agreements as presently submitted. As long as the ambiguity exists the agreements are contrary to the public interest and cannot be approved.[8] Therefore, before approval can be accorded to the agreements under consideration, the parties will be required to modify the agreements to clarify the ambiguous language in the tonnage clauses. The clarification is to be submitted in conjunction with other modifications required herein. We wish to emphasize that the parties' modification of the tonnage clauses in this proceeding will in no way prejudice their rights or positions in other litigation now before us involving similar issues.

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[5] Certain of the following modifications also apply to Agreement No. T-3130 and, where applicable, both agreements are treated together.

[6] Docket No. 75-48 is a complaint proceeding filed by Sea-Land against Anchorage and Tote involving alleged violations of sections 15 and 16, First by Anchorage and Tote in connection with both agreements.
Docket No. 76-4 is a complaint filed by Anchorage against Sea-Land alleging that Sea-Land has violated section 15 by attempting to induce Anchorage to grant it special and preferential privileges not available to other carriers which are not granted by an agreement approved pursuant to section 15. One of the key issues for determination in both proceedings is the interpretation of the clause in the agreements relating to the charges to be assessed when either Sea-Land or Tote have exhausted their number of preferential calls under their respective agreements with Anchorage.

[7] While it may be argued that the Commission can resolve an ambiguity in a previously approved agreement such as Agreement No. T-1685, this rationale does not apply to Agreement No. T-3130 which is before us for the first time.

[8] On several occasions the Commission has pointed out that, "all agreements should be complete and the language used should be so clear as to eliminate all necessity for interpretation as to the 'intent' of the parties." *In the Matter of Agreement 6510*, 1 U.S.M.C. 775-778, 2 U.S.M.C. 22. See also *Beaumont Port Commission v. Seatrain Lines, Inc.*, 3 F.M.B. 556, 581, and *In the Matter of Agreement FF 71-7 (Cooperative Working Arrangement)*, 14 S.R.R. 609 where the Commission concurred in the Presiding Officer's conclusion that it would be "contrary to effective regulation to approve an agreement which is subject to various interpretations and involves uncertainties" at p. 614.

Coastal excepts to the Presiding Officer's failure to adopt a specific modification to Agreement No. T–1685–6 which would permit Coastal's barge to remain berthed at Terminal 2 while engaged in cement discharging operations. Coastal contends that although the Presiding Officer recognized a need for modification of both agreements to accommodate Coastal's off-loading cement operations and did modify Tote's agreement, he failed to discuss or adopt any modification with respect to the Sea-Land agreement. Accordingly, Coastal requests that a condition be attached to the approval of Agreement No. T–1685–6 which would ensure that Sea-Land would not interfere or interrupt Coastal's discharge of bulk cement at Terminal No. 2. In the alternative, Coastal requests that the agreement be amended to specifically require that Sea-Land berth its vessels at Terminal Nos. 2 and 3 in such a manner as to leave at least 237 feet of the southern portion of Terminal No. 2 available for Coastal's use during such times as bulk cement discharging operations require barge utilization of the facilities at that facility. This provision would allegedly permit the simultaneous berthing of Coastal, Sea-Land and Tote vessels.

Sea-Land, in its response to Coastal's exceptions, is agreeable to the alternative condition requested by Coastal provided that Coastal gives Sea-Land advance notice of any intended calls to minimize any berthing problem and provided a space on Terminal No. 3 is available.

We agree with Coastal's request, concurred in by Sea-Land, that Agreement No. T–1685–6 should be modified to make 237 feet of the southern portion of Terminal No. 2 available for Coastal's use during such time as bulk cement discharging operations require barge utilization of the facilities at Terminal No. 2. Such space need be made available, however, only to the extent that sufficient berthing space is open at Terminal 3 for use by Sea-Land vessels. Coastal will be expected to provide Sea-Land with reasonable advance notice of its intention to call at the facility, but in no event should this notice be less than seven days. Since Coastal provides a weekly service to Anchorage it should know seven days in advance when it will call at the Port.

Unless Agreement No. T–1685–6 is modified in accordance with the conditions specified herein, it would be contrary to the public interest and not approvable inasmuch as it would severely limit Coastal's ability to call at Anchorage. Coastal needs access to the cement headers, and the utilization of Terminals 1 and 2 by Tote and Sea-Land, respectively, coupled with the time required to service Coastal's barge, would result in substantial detriment to Coastal in the discharging of bulk cement at Anchorage.

For the same reasons we agree with the modifications of Agreement No. T–3130 proposed by the Presiding Officer with respect to the berthing of Coastal's barge in a portion of Terminal 1.

B. Modification and Approval of Agreement No. T–3130

Sea-Land excepts to the finding of the Presiding Officer that the preferential use of Transit Area B by Tote "should not result in any detriment to other users of the port." Sea-Land argues that it should have access to back-up areas adjacent to its preferential berths. As approved by the Presiding Officer, Agreement No. T–3130 gives Tote Transit Area B which is directly behind Terminal 2 while under Agreement No. T–1685–6, Sea-Land's marshalling area is directly behind Terminal 1. This, of course, results from the fact that when Sea-Land was at Terminal 1 its back-up area was adjacent to its berth. Sea-Land believes that Transit Area B should be reallocated to it and, in turn, Sea-Land would turn over Lot 12–A (which is behind Terminal 1) to Tote in exchange for Lot 3–A (which is behind Terminal 2).

Both Anchorage and Tote oppose Sea-Land's suggestion. Tote argues that certain of the areas in question are not included in the pending agreements and the Commission properly has no interest in the manner in which the Port leases these properties.[9] Both Anchorage and Tote believe that Sea-Land's proposal would work a disadvantage to Tote inasmuch as Lot 12–A, from an operational point of view, is marshy and only about one-third the size of Transit Area B.

Tesoro, the only party still opposed to approval of both agreements, filed lengthy exceptions to the Presiding Officer's Initial Decision. Tesoro's major objection is addressed to the Presiding Officer's rejection of Tesoro's "queing theory." Tesoro's "queing theory" is a statistical technique used to predict the degree of port congestion which would result if the Tote and Sea-Land preferential agreements were approved. The theory employs a formula based on the relationship between the frequency with which the users of a given facility arrive at that facility and the average length of time needed to serve them. This theory assumes that arrival and service rates are random, that arrivals will conform to the "poisson" probability distribution and that service rates will conform to the exponential probability distribution. Tesoro's testimony in connection with the use of the queing theory is both extensive and complex.

The Presiding Officer rejected the testimony of Tesoro's witness on the grounds that the queing theory assumed both random service time and arrival rates. The Presiding Officer specifically found that as regards Tote's potential operation under the preferential agreement its service time and arrival rate should not be considered random. The Presiding Officer found that Tote's proposal to operate a regular scheduled service coupled with the requirement that it notify the Port 15 days in advance of scheduled arrival times destroys the validity of the queing theory espoused by Tesoro.

Tesoro's response to these arguments is that there was a total "misstatement on Judge Levy's part of what the testimony actually was."

[9] The issue of whether these latter agreements should be filed for section 15 approval is discussed later.

Tesoro contends that its expert witness did not ignore the effects of scheduling in his analysis of the Anchorage situation, and indeed made adjustments in his results to account for scheduling.

Also at issue is the Presiding Officer's finding that "paradoxically" Tesoro treats Tote's operations as random but does not apply the theory to Sea-Land's operations which are also conducted on a scheduled basis. Tesoro explains that the queing theory was not applied to Sea-Land because there was no point in doing so inasmuch as the objective was to ascertain the impact of the preferential agreements on other users. Since Sea-Land would, because of the number of preferential calls provided in its agreement with Anchorage, in effect, completely occupy the terminal to which it is assigned, Tesoro explains that there was no purpose in applying the queing theory to Sea-Land because whatever conflicts might result at that terminal would only affect Sea-Land.

Tesoro also disputes the Presiding Officer's findings that other users of the Port can schedule their operations around Tote's arrivals so as to avoid berthing conflicts when Tote is at berth. Allegedly, Tesoro is unable to maintain a regular schedule because of navigational problems, winterized conditions and tide conditions at Nikiski. The Presiding Officer's conclusion that Tesoro has the ability to improve the efficiency of its own operation is, according to Tesoro, completely at variance with his own earlier findings and must be disregarded.

Various arguments are also raised by Tesoro in opposition to the Presiding Officer's conclusion that approval of both agreements would serve a serious transportation need. The position taken by Tesoro on this point is essentially a reargument of contentions advanced before the Presiding Officer. In short, Tesoro's position is that efficient utilization of Anchorage's facilities would be promoted if all preferences were denied.

Tesoro submits that Tote's service is not "unique" and that the record fails to show that there is any substantial demand for additional service to Anchorage. There has been allegedly no showing by the proponents of Agreement No. T-3130 that the public would benefit more from the uninterrupted receipt of dry cargo than from uninterrupted access to petroleum products or other goods.

Tesoro also opposes any approval of Agreement No. T-1685-6. Tesoro is of the opinion that the Presiding Officer's conclusion that Sea-Land's agreement is justified because "the considerations which led the Commission to approve the initial preferential use agreement between Sea-Land and Anchorage are unchanged," is erroneous. Tesoro argues that everything has changed at the Port. Increased traffic and a new carrier at the Port have allegedly placed unprecedented demands on Anchorage's facilities. Tesoro submits that the Presiding Officer failed to consider whether Sea-Land's agreement was in the public interest in view of these changed circumstances.

Finally, Tesoro contends that the Presiding Officer improperly failed to incorporate two of Tesoro's proposed modifications into his approval.

Tesoro had urged that if the proposed agreements are approved, such approval should be subject to the following conditions:

1. Agreement No. T–3130 should be amended to require immediate improvement of the petroleum off-loading facilities at Terminal 1.

2. Both agreements should be suspended between November and April.

3. Agreement No. T–3130 should be approved for only one year, subject to renewal if Tote's relocation to Terminal 3 is not feasible.

The Presiding Officer accepted the first condition but rejected the latter two.

Tesoro maintains that because of ice conditions its barge service is restricted during winter months and in order to keep up oil supplies it must make as many deliveries as possible during periods of good weather. Tesoro's ability to do this will allegedly be severly hampered if Tote is at Terminal 1 on a preferential basis during the winter. For this reason Tesoro requests an annual suspension of Agreement No. T–3130 from November to April.

Tesoro argues that limiting whatever approval is accorded Agreement No. T–3130 to one year will ensure that a "temporary" location does not become a permanent arrangement.

Anchorage, in response to Tesoro's Exceptions, is of the opinion that Tesoro will be affected less by the preferential berthing rights under Agreement No. T–3130 than it was under Agreement No. T–1685. While acknowledging that Tote will restrict access to both the POL and Terminal 1 facilities when it is on berth, Anchorage concurs in the Presiding Officer's finding that the total time available to petroleum users at both the Pol Terminal and Terminal 1 will be significantly increased.[10]

Tote and Hearing Counsel advance similar arguments supporting the Presiding Officer's finding that Tesoro will be affected less under the new arrangement than with Sea-Land at Terminal 1. Tote argues that this is especially true when one considers that: Nikiski (where Tesoro has its refining facility) is only 60 miles from Anchorage; Tote has obligated itself to notify carriers of its schedule, and any variations therefrom; and Tote has agreed to cooperate in resolving any conflicts that may arise. According to Tote, Agreement No. T–3130 will minimize delays for all petroleum users and particularly Tesoro.

Tote and Anchorage both challenge Tesoro's "attempts to supplement its evidence with what it calls 'utilization analysis.' " While Tote objects to the "new and unsupported material" on procedural grounds, it does address Tesoro's arguments on exception. Thus, Tote argues that one of Tesoro's major propositions *i.e.*, that users of Terminals 2 and 3 will flock to Terminal 1, is directly contrary to the testimony of Tesoro's expert

[10] The Presiding Officer found that the potential time the POL facility and Terminal 1 will be occupied because of Tote's agreement would be 25 percent leaving each facility free 75 percent of the time for petroleum users. Under Agreement No. T–1685, Sea-Land blocked access to Terminal 1 60 percent of the time, and with the proposed amendment, Sea-Land would block Terminal 1 80 percent of the time.

witness at the hearing. Both Anchorage an Tote conclude that there is no basis in the record for Tesoro's assumption in this regard.

The Presiding Officer's rejection of Tesoro's "queing theory" is also supported by Tote and Anchorage. One of the Presiding Officer's criticisms of Tesoro's theory was that it is not applicable to Sea-Land's operations because Sea-Land operates on a scheduled basis. On exception, Tesoro argues that the Presiding Officer misinterpreted the testimony. Both Anchorage and Tote seize on this point contending that the transcript clearly shows that Tesoro's witness specifically stated that ". . . since Sea-Land can schedule itself its arrivals, its operation is not compatible with queing theory." Tote argues that since it plans to operate on a regular scheduled basis the queing theory is also not applicable to its operations.

Tote details other alleged deficiencies in Tesoro's queing theory including its failure to take into consideration the impact resulting from the disapproval of both agreements. While Tesoro has set forth the dollar impact of three berthing alternatives, it failed to weigh the impact on Tesoro of disapproval of both agreements. The benefit, even to Tesoro, from this approach cannot be determined, and for this reason Tote believes that Tesoro's request for disapproval must be rejected.

We find no basis to set aside the Presiding Officer's rejection of Tesoro's "queing theory." As stated, the classic "queing theory" assumes both random service times and arrival rates. Tesoro's witness recognized that Tote would operate on a reasonably regular basis and reduced his theoretical calculations by one half. However, this reduction was completely arbitrary and evidences the difficulty of adopting a highly complex theory to a relatively practical terminal operation.

Even assuming, *arguendo*, that the conclusions reached by Tesoro through utilization of the "queing theory" were valid, they do not sway us to a finding that Agreement No. T–3130 should be disapproved. Tesoro's "bottom-line" figure for adjusted waiting times for oil barges and tankers with Tote having a preference at POL/Terminal 1 and Sea-Land at Terminal 2 is an increase of three hours over the adjusted waiting times in the base case where Sea-Land remains at Terminal 1. According to Tesoro, this delay translates into additional costs of $505,000.

The calculations used to derive the three hour figure are all theoretical and do not provide a sufficient basis for disapproving Agreement No. T–3130. An example is the arbitrary reduction of one half taken by Tesoro to account for Tote's scheduled operations. Also, in computing the alleged cost resulting from the additional delay, Tesoro used trucking costs exclusively and ignored the alternate method of tankers which are significantly less expenive than trucks. While the tankers would also have been delayed, this is still a viable alternative open to Tesoro. Tesoro also fails to consider the costs to Tote if its preference at POL/Terminal 1 is denied.

The critical determination with respect to approvability of both agree-

ments is whether they are "unjustly discriminatory or unfair as between carriers, shippers, exporters or importers, or operate to the detriment of the commerce of the United States, or are contrary to the public interest, or are otherwise in violation of the Shipping Act, 1916," within the meaning of section 15 of that Act. While we do not necessarily agree with all the conclusions reached by the Presiding Officer, it is our opinion that there is no basis in the present record for disapproval of either agreement.

Certainly, Tote's service is in the public interest in that it provides a fast and alternative viable service to the shippers in Anchorage. The question then becomes whether the granting of a preferential berthing arrangement to Tote and Sea-Land is contrary to the public interest or otherwise contrary to the standards in section 15 because of its effect on nonpreferential users. While, admittedly, both agreements will result in certain delays and disruption of operations of other carriers, such as Tesoro, it is our opinion that, overall, these delays and disruptions will be minimal and certainly not of such magnitude to preclude approval of the agreements.

In considering the positions of the various parties and reaching a determination of where the public interest lies, we must weigh the short-range objections of Tesoro against the long-range impact of both agreements on the Anchorage community. Tesoro has admitted that it will utilize the oil pipeline linking Nikiski and Anchorage which is now under construction. While a firm date for completion of the pipeline has not been set, the record indicates that it will probably be within the next six months. Our consideration of both agreements must take into account the public interest factor as it exists at the time of our approval; however, we cannot ignore the fact that Tesoro, the only party still vigorously opposed to approval, will have significantly less dependency upon the Anchorage docking facilities once the pipeline is completed. Again, with the exception of the evidence relating to the modifications discussed herein, the record will not support a finding that either agreements is contrary to the public interest and therefor not approvable.

Tesoro's remaining exceptions relating to the Presiding Officer's failure to incorporate two proposed modifications in the agreement must also be set aside for the reasons discussed above. In our review of both agreements we took into consideration weather conditions and their effect on all users of the Port's facilities. Tesoro's request for a suspension of both agreements between November and April because of the impact of weather conditions on its operations is not sufficiently supported in the record to warrant the modification as a condition of approval. We also find no basis upon which to limit the approval of Agreement No. T-3130 to one year. That the Port intends to relocate Tote to Terminal 3 when that facility is completed is insufficient, in and of itself, to support a finding that approval for a period of more than one year would be contrary to the public interest.

C. Violations of Section 15 by Tote and Anchorage

Both Anchorage and Tote excepted to the Presiding Officer's finding that they violated section 15 by carrying out an agreement for the construction and use of facilities at Anchorage without prior approval by the Commission. However, the Presiding Officer also determined that this violation of section 15 did not, in itself, warrant disapproval of Agreement No. T–3130.

The Presiding Officer based his determination of a violation prinicpally on the finding that the trestle agreement "is so much a part and parcel of the preferential use agreement as to be inseparable therefrom" and that "but for use by Tote in connection with preferential berthing there would be no sense in its undertaking."

Anchorage on exception takes the position that the trestles were necessary for Tote's *non*preferential use of the Port's facilities and without the trestles, Tote's ability to remain in the trade on a nonpreferential basis would have been materially prejudiced. Thus, Anchorage submits that the construction agreement is not tied to the preferential berthing agreement and the construction agreement, standing alone, is not subject to section 15. The agreement allegedly confers no special and preferential privileges upon Tote and could be utilized by other users at the port.

In support of their contention that construction and use of the trestles does not violate section 15, Anchorage and Tote rely on the Commission's pronouncement in *Agreement Nos. T–2108 and T–2108–A*, 12 F.M.C. 110, 125 (1968) that:

> [I]f a port is prohibited from improving its facilities in contemplation of entering into and obtaining Commission approval of an agreement providing for a return to the port of its investment, progress would be unnecessarily and severely limited. The construction of improvements is not carrying out the agreement. It is the commencing of the preferential use that causes the agreement to be in effect. (p. 125)

The Presiding Officer found that Anchorage and Tote's reliance on that case was misplaced. In his view, the instant situation could be clearly distinguished on the basis that: "Anchorage did not construct the facility as a preliminary to leasing. The potential user undertook the construction."

Both Tote and Anchorage are of the opinion that the Presiding Officer's attempt to distinguish the case on the basis that it was Tote that paid for and constructed the trestles as opposed to the Port is "truly a distinction without a difference." According to Tote, the decision in *Agreement No. T–2108, supra,* stands for two propositions:

> . . . (1) 'mere construction,' without preferential use, does not constitute carrying out of the agreement; and (2) construction, without preferential use, is, in any event, justifiable when delay would deter progress.

The parties argue that the trestle construction agreement is not subject to section 15 for two reasons. First, the actual agreement between the

parties relating to the construction of the trestles is allegedly set out in a distinct, separate, agreement. As such, it is submitted that no preferential rights or special privileges are conferred upon Tote by the trestle construction agreement and therefore that agreement, by itself, is not subject to section 15. Second, Tote and Anchorage contend that if it is determined that the construction of the trestles is included within Agreement No. T–3130 and a part thereof, there has allegedly been no violation of section 15 because Tote has not exercised a preference to the facilities.

Hearing Counsel and Tesoro support the Presiding Officer's findings with respect to the violations of section 15. Hearing Counsel point out that Anchorage and Tote admit that the trestles were constructed under the same terms and conditions set forth in Agreement No. T–3130 and that Tote had exclusive use of the trestles. In this regard, Hearing Counsel cite Docket No. 72–61, *In the Matter of Agreement Nos. T–2455/T–2553*(1974), wherein the Commission affirmed the Presiding Officer's finding that:

> . . . once it is determined that a particular part requires that the agreement be filed pursuant to that section, the statute is clear that the entire agreement must be filed—not only the clause giving rise to jurisdiction. And that before approval, no part of that agreement may be implemented. (p. 20 mimeo opinion).

The Presiding Officer determined that the parties violated section 15 in either of two ways: (1) by considering that the construction of facilities are provided for in Agreement No. T–3130 and that the actual construction prior to approval is a violation of section 15, or (2) by considering the construction agreement as a separate and distinct agreement which has been implemented prior to filling and approval by the Commission.

While either approach would be acceptable to Hearing Counsel, they favor the former, *i.e.* that the construction of the trestles was an integral part of Agreement No. T–3130 and that the arrangement between the parties relating thereto should be filed as an amendment to that Agreement.

Tesoro, while agreeing generally with Hearing Counsel, takes issue with the Presiding Officer's finding that the violations do not warrant disapproval of Agreement No. T–3130. Tesoro would distinguish those cases cited by the Presiding Officer in support of his finding that a violation of section 15 does not necessarily preclude approval by the Commission of the Agreement.

Equally without merit, according to Tesoro, is Tote's contention that the Commission has no jurisdiction over the construction agreement because it does not "create on-going rights" which require "continuous Commission supervision." *F.M.C. v. Seatrain Lines, Inc.*, 411 U.S. 726, 731 (1973). Tesoro points out that the indemnification provisions set forth in the construction agreement create on-going rights which survive the completion of construction and which should be of concern to the

Commission because they purport to insulate Anchorage from the consequences of prior implementation of the Agreement.

We affirm the Presiding Officer's findings of section 15 violations on the part of Tote and Anchorage. The construction agreement should be considered a part and parcel of Agreement No. T–3130[11] and the construction and use of the trestles prior to approval of the Agreement is a clear violation of section 15. The construction and preferential use of the trestles is described with sufficient particularity to include it within Agreement No. T–3130. That agreement is replete with references to the trestles and whole sections of the trestle construction agreement are repeated *verbatim* therein.

The Presiding Officer correctly found Anchorage's and Tote's reliance on *Agreement Nos. T–2108 and T–2108–A, supra,* was inappropriate. In that case the Port of Los Angeles undertook certain improvements contemplated in the agreement before Commission approval. However, those improvements were only part of the extensive construction undertaken by the Port. In addition, the initial construction by Los Angeles was a unilateral action by the Port. Here, the construction of the trestles was specifically geared to Tote's operations and Tote was responsible for the construction of the trestles at Anchorage's terminal under the Port's supervision.

Finally, Agreement No. T–3130 provides that Tote shall have preferential use of the trestles. The record herein shows that Tote has had exclusive use of the trestles since they were completed. Despite Anchorage's assertion on exception that other carriers at the Port could have used the trestles upon request, there is testimony that Tote stored its ramps on the trestles thereby restricting their availabiltity to other users. Tote argues that our Order of Investigation phrased the issue of the trestles in terms of their "construction," not "use," but surely it cannot be seriously argued that there is less of a violation when it is determined that they were not only constructed but actually used on an exclusive basis prior to approval. We conclude, therefore, that both Tote and Anchorage have violated section 15 through the construction and use of the trestles set forth in Agreement No. T–3130 prior to approval by this Commission.

This conclusion does not, however, contrary to the assertions of Tesoro, preclude the approval of Agreement No. T–3130, if it is otherwise approvable under the standards of section 15. See *Agreement No. 8905—Port of Seattle and Alaska, S.S. Co.*, 7 F.M.C. 792, 799 (1964); *In the Matters of Agreement Nos. T–2455/2553, supra,* p. 458; and *Agreement No. T–2598,* 14 S.R.R. 573, 581 (1974). Also, *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213, 221 (1966).

[11] While we are basing our finding of a violation of section 15 herein on a determination that the construction agreement is included within Agreement No. T–3130, it is also our opinion that the construction agreement taken by itself would be subject to section 15. *Greater Baton Rouge Port Commission v. United States,* 287 F.2d 86, 92 (1961).

D. Introduction of a Second Tote Vessel

On exception, Hearing Counsel point out tha Agreement No. T-3130 is not limited to a single vessel and does not limit Tote to one preferential call per week but refers instead to 52 vessel calls per agreement year.

In this connection, Hearing Counsel request the Commission to take official notice of a report appearing in Traffic World (May 3, 1976) to the effect that Tote planned to place a second vessel in the Alaskan trade. In order to avoid any future misunderstandings, Hearing Counsel recommend that Agreement No. T-3130 be modified to specify that Tote will have the right to one preferential vessel call per week rather than 52 per year.

Tesoro requests that the proceeding be reopened to receive additional evidence concering Tote's plans for the introduction of a second vessel. According to Tesoro, the introduction of a new vessel into the trade would invalidate most, if not all, of the Presiding Officer's conclusions and necessitate reconsideration of the entire preferential berthing issue.

Both Tote and Anchorage consider Tesoro's request to reopen the proceeding as an attempt to delay approval of the agreements and to be without merit. While Anchorage generally supports the modification suggested by Hearing Counsel, Tote does not. Tote admits the introduction of a second vessel and explains that while it has no intention of "bunching" preferential voyages, some flexibiity is needed to compete and serve the needs of the shipping public. Furthermore, there are allegedly numerous events beyond its control such as weather, vessel repairs, etc. which could occasionally cause a delay and which could result in Tote's losing a preferential voyage. Tote argues that because its agreement requires 15 days' notice for a preferential call, it would be impossible for a replacement vessel to make that preferential call within the same week in the event that the primary vessel broke down or was delayed by weather. For these reasons, Tote has advised that a "concrete limitation of one call per week is not reasonable for it is far too harsh and results in total inflexibility."

The testimony in the record relating to approval of Agreement No. T-3130 is premised on the understanding that Tote would serve Anchorage with one preferential call per week. The Initial Decision of the Presiding Officer was also based on this assumption. Tote now states that it intends to exercise its right to make its 52 preferential calls as demand merits. The impact of what Tote now proposes is not determinable on the present record and would require a complete evidentiary review. We see no reason to burden the parties by remanding the proceeding for further hearings on this limited point; instead, we intend to hold Tote to the terms of Agreement No. T-3130 and require that it berth its vessels on a preferential basis "approximately one time per week." "Approximately" means that Tote will be limited to one preferential call per week *unless* it is unable, by reason of weather conditions, an emergency to its scheduled

vessel, or other conditions beyond Tote's control to make a preferential call at Anchorage during a given week. Only in the event that Tote is unable to make a preferential vessel call during a particular week because of circumstances beyond its control, will it be permitted to double its preferential calls in a subsequent week. As an alternative to Tote's doubling its preferential calls because of unforeseen circumstances described above, Tote may employ a replacement vessel to make a scheduled preferential call without providing the 15 days' notice. Further, Tote will provide Anchorage with prompt notice of its inability to make a preferential call as scheduled, and its intent to either (1) double its call in a subsequent week, or (2) utilize a replacement vessel to make the weekly preferential call.

E. Unfiled Section 15 Agreements

Hearing Counsel excepts to the Presiding Officer's determination that certain leases to back-up areas at Anchorage are not section 15 agreements. The leases in question were never introduced into the hearings. Hearing Counsel's attempt to enter the leases as late-filed exhibits was rejected by the Presiding Officer. On brief, Hearing Counsel once again raised the question of the leases and their subjectivity to section 15. In his Initial Decision the Presiding Officer noted that the Commission Order instituting this proceeding did not include as an issue the matter of the back-up leases and that "a serious question now arises whether the introduction of this issue at the briefing stage by Hearing Counsel violates the notice provisions for due process."

However, to avoid a subsequent remand on this issue, the Presiding Officer considered the leases to the back-up areas and found them not subject to section 15. This determination was based on a finding that the leases appeared to be routine real estate transactions involving nothing more than a landlord-tenant relationship. Citing the Commission's interpretative rulings (46 C.F.R. 530.5), he concluded that such agreements are not subject to section 15 "and that in order to bring such an agreement under section 15 some of the activities described in that section must be covered by the agreement." in the back-up leases. In so doing, he rejected Hearing Counsel's argument that the leases are part of the same integrated operation as the subject Agreements and may effect Anchorage's operations.

The Presiding Officer was also not persuaded by Hearing Counsel's arguments that similar leases between Sea-Land and Anchorage were filed and approved by the Commission pursuant to section 15. The Presiding Officer is of the opinion that the Sea-Land leases were also not within the scope or purview of section 15 "and the Commission's routine approval thereof is not to be considered a definitive ruling that they were required section 15 submissions."

It is our opinion that the Presiding Officer erred in his disposition of this matter. Since the Presiding Officer refused to allow Hearing Counsel to

enter the leases into evidence as late-filed exhibits his subsequent consideration of the merits of the agreements was improper. However, with two exceptions, we do not disagree with his ultimate conclusion that the back-up leases are not section 15 agreements.

Our Order of Investigation, while not specifically addressing the issue of back-up leases, was sufficiently broad enough to encompass not only the preferential berthing aspects of the two agreements, but any other agreements which comprised the complete understanding between the parties.

Hearing Counsel's allegations raised the issue of whether the complete agreements were before the Commission. These substantive allegations should have been considered by the Presiding Officer. He should have admitted the back-up leases into evidence and his refusal to do so was error.[12]

However, a resolution of this particular issue does not require our remanding the proceeding to the Presiding Officer. The existing record is sufficient to permit the Commission to make a determination regarding the back-up leases.

Notwithstanding the Presiding Officer's refusal to permit the subject leases to be introduced into evidence, the matter of whether such leases are subject to section 15 was discussed by Hearing Counsel and Anchorage in their briefs. The matter was also addressed by Hearing Counsel in their exceptions to the Initial Decision to which Anchorage and Tote responded. Further, there is testimony in the record relating to the back-up leases.

Therefore, the following agreements are admitted as late-filed exhibits and designated as follows:[13]

1. Lease between Sea-Land and Anchorage dated December 10, 1970 pertaining to the lease of Lots 5A and 5B (now redesignated 5C) at the Port of Anchorage—Exhibit No. 124.

2. Assignment of a lease from Jack E. Cole and Donald D. Emmal to Sea-Land, with the consent of Anchorage, a lease dated September 28, 1973 pertaining to the lease of Lot 5F (now redesignated 6D) at the Port of Anchorage—Exhibit No. 125.

3. Lease between Tote and Anchorage dated July 24, 1975 pertaining to the lease of Lots 3A and 2B at the Port of Anchorage—Exhibit No. 126.

Upon examination of the above leases and review of the record in this proceeding as it relates to those leases, we find that the Presiding Officer was correct in finding that these back-up leases are not subject to section 15. This determination is based not only on a review of the agreements standing alone, but on a consideration of the interrelationship between the

[12] No objections were raised by the parties to the introduction of the leases when they were originally submitted by Hearing Counsel.

[13] The two Sea-Land back-up leases executed with Anchorage in 1964/1965 (Agreement Nos. T–1685–A and T–1685–A–1) were routinely filed and approved as section 15 agreements when originally submitted. Whatever prompted that approval in 1964/1965, there is nothing in the record in Docket No. 75–35 which necessitates our disturbing that action here.

preferential leases and the leases for the back-up areas. There is no proper basis in this record upon which we can find that the back-up leases were part of the total understanding between the parties.

Of the leases in question, only the lease between Tote and Anchorage covering Lots 3A and 2B was negotiated after 1974 and there is testimony regarding the sequence of events leading up to the effectuation of this lease. While the preferential berthing and the back-up areas "cover areas in the same locale," as discussed in *Agreement No. T-4, supra,* there is no adequate showing that the "activities accomplished in this property are essential to [Tote's] integrated containerized operations." Based on prior Commission determinations the two Sea-Land leases executed in 1970 (Exhibit No. 124) and 1973 (Exhibit No. 125), standing alone, are not subject to section 15. Moreover, we find no evidence in this record that these leases are so related to the preferential berthing agreement to bring them within the purview of section 15

For these reasons we concur in the findings of the Presiding Officer that, on the facts before us in the record, the particular leases to back-up areas described above are not sbject to section 15.

F. Pipeline Construction

Tesoro takes issue with the Presiding Officer's conclusion as to the "probable abandonment of barge service by Tesoro in the not too distant future" because of construction of an oil pipeline linking Nikiski to Anchorage. Tesoro argues that the Commission should reject this conclusion because it is not supported by the record and the future of the pipeline is uncertain because of the lack of adequate financing.

Whatever merit there may have been to Tesoro's exception has been mooted by Tesoro's admission during oral argument that Tesoro has purchased the pipeline which is now under construction. It is inconceivable that Tesoro will not utilize the pipeline once it is completed. Indeed, Tesoro's vice-president testified that his company would use the pipeline for transporting its products from Nikiski to Anchorage. However, while the effect of the pipeline on Tesoro's operations is of some relevance in our consideration of the pending agreements, there is adequate evidence in the record to reach a determination with respect to both agreements without undue resort to the pipeline issue.

G. Other Modifications

The Presiding Officer conditioned his approval of the agreements on the parties modifing them in certain other respects. The majority of those modifications reflect accommodations reached between the parties. For example, under Agreement No. T-3130, Tote is to clear space in Transit Area B to accommodate Coastal's cargoes. Coastal, in turn, is to give five days' notice to Tote and must clear the assigned area as rapidly as possible. There is no finding by the Presiding Officer that Coastal will be harmed by its non-preferential use of Transit Area B, or that the

agreement as presently drafted in this regard fails to meet the approval standards of section 15, nor is there any proper basis in the record in this proceeding to so conclude. It is our opinion, therefore, that we cannot legally impose this modification as a condition to approval of Agreement No. T-3130.

The same holds true for the Presiding Officer's "modification" requiring the installation of additional piping and a crane at Terminal 1. While Tesoro had requested the imposition of such a requirement, and Anchorage has already agreed that if Agreements No. T-1685 and T-3130 are approved, it will make the necessary improvements at Terminal 1, there is no evidence that such improvements are necessary for approval. The Presiding Officer merely found that "it appears appropriate" that Agreement No. T-3130 be modified to require such improvements.

Similarly, the modifications relating to the Port Director's authority to suspend preferential rights for safety reasons and to order Tote to vacate Transit Area B after five days cannot legally be made conditions of approval. While such modifications might clarify the Port Director's authority there is no basis in this record to conclude that the Agreements without the modifications cannot be approved.

For the most part, the various modifications proposed by the Presiding Officer are basically the result of understandings reached by the parties during the proceeding. The fact that these accommodations were arrived at in this manner may explain the absence of any extensive discussion of these matters on the record. Nevertheless, there is no basis upon which the Commission may *impose* the modifications as a condition for approval.

To the extent, however, that these modifications reflect the understanding of the parties with regard to the future implementation of the agreements at issue herein, they should be filed for approval pursuant to section 15 before they are implemented. Accordingly, in order to provide the parties every opportunity to process a complete agreement we will withhold the issuance of our final order in this proceeding pending their submission.

Environmental Issues

The Commission's Office of Environmental Analysis (OEA) prepared a Threshold Assessment Survey (TAS) and reached the conclusion that the environmental issues relative to this proceeding did not constitute a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §4321, *et seq.* and that the preparation of a detailed environmental impact statement was not required under Section 4332(2)(C) of NEPA.

A notice of Environmental Negative Declaration was published in the *Federal Register* on May 3, 1976. Exceptions to the Declaration and basic TAS were filed by Anchorage, Sea-Land and Tesoro. We have examined

each of these exceptions, the OEA's response thereto, (Addendum to TAS) as well as the underlying TAS and conclude that there is nothing which would cause us to reverse the TAS's finding of environmental non-significance. Accordingly, we adopt the Environmental Negative Declaration prepared by OEA and make it a part of our decision herein. The TAS and the Addendum thereto are available for inspection on request to the Public Information Office, Room 11413, Federal Maritime Commission, 1100 L Street N.W., Washington, D. C. 20573.

CONCLUSION

Required Modifications

Agreement No. T–3130 is approvable subject to the parties submitting modifications requiring that Tote tie up its vessel at POL/Terminal 1 so as to leave available for the berthing of Coastal's Barge 201 a minimum of 125 feet measured from the northern boundary of Terminal 1. The modification should further provide that (1) if 125 feet is insufficient to berth simultaneously Tote's vessel at POL/Terminal 1, Coastal's Barge 201 at Terminals 1–2 and a Sea-Land vessel at Terminals 2–3, because of Sea-Land's inability to berth and off-load at Terminal 3 from a dockside point north of the southern boundary of Stevedore Building No. 2, then Tote will berth its vessel so that Coastal's Barge 201 may berth at Terminal 1 in space in excess of 125 feet provided that Tote's vessel does not have to move from its ramp locations and that the aft mooring line of Tote's vessel has a clear run to a safe ballard; and (2) immediately prior to arrival of Tote's vessel at the POL/Terminal 1, any vessel at Terminal 1 will vacate said Terminal in order to permit Tote's vessel to berth upon her arrival, except that Coastal's Barge 201 will not be required to cease discharging operations and vacate its berth, unless the Pilot and Captain of Tote's vessel determine that Coastal's Barge 201 must vacate in order to permit the safe docking of the vessel.

With respect to the preferential berthing of Tote's vessel "approximately one time per week," the parties are further required to modify Agreement No. T–3130 to specifically indicate that "approximately" means that Tote will be limited to one preferential call per week unless it is unable, by reason of weather conditions, an emergency to its scheduled vessel, or other conditions beyond its control, to make a preferential call at Anchorage during a given week. In that event, Tote will be permitted to double its preferential calls in a subsequent week or, in the alternative, employ a replacement vessel to make a scheduled preferential call without providing the 15 days' notice. The modification shall also provide that Tote will furnish Anchorage with prompt notice of its inability to make a preferential call as scheduled and its intent to either (1) double its call in a subsequent week, or (2) utilize a replacement vessel to make the weekly preferential call.

Agreement No. T–1685–6 is approvable if it is modified to require Sea-

Land to berth its vessels at Terminals 2 and 3 in such a manner as to leave 237 feet of the southern portion of Terminal 2 available for Coastal's use during such times as bulk cement discharging operations require barge utilization of the facilities at Terminal 2, with the understanding that such space shall be made available to the extent sufficient space is available at Terminal 3 for the berthing of Sea-Land vessels. The modification shall require Coastal to give reasonable notice to Sea-Land in advance to minimize any problem in connection with the cement barge.

In addition, as a condition for approval, both agreements shall be modified to indicate specifically whether tonnage fees assessed against Sea-Land and Tote upon completion of the stated number of preferential calls in their respective agreements will be at the rates set forth in Anchorage's tariff or at the rates specified in the agreements.

The Commission's approval is further conditioned on the required modifications to both agreements being submitted to the Commission within 30 days from the date of this Report.

Other Modifications

During the 30-day period, the parties are also asked to submit any further amendments reflecting various accommodations reached among themselves during the proceeding. We intend to notice any amendments in the *Federal Register* and allow interested persons to comment thereon. Our final order with respect to both agreements will be held in abeyance pending submission of the required modifications and review of any additional amendments presented.

Vice Chairman Clarence Morse, concurring and dissenting.

I do not agree that the back-up leases are not subject to section 15. Considering the geographical limitations of the port and the absolute necessity for container and Ro/Ro carriers to have container yards, etc., it is not conceivable that we lack subject matter jurisdiction. The leases involve ongoing relationships between Anchorage and the carriers for the sole purpose (as stated in each lease) of providing indispensable facilities for the conduct of ocean carrier operations. Also, the carriers will have preferential rights to the piers, thereby making their leases similarly restrictive of competition.

Consequently, in view of the need for prompt action by the Commission, I would grant interim approval to the back-up leases pending further proceedings.

In all other respects I concur.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-55

PETITION FOR DECLARATORY ORDER OF MATSON NAVIGATION COMPANY

ORDER

January 7, 1977

Matson Navigation Company (Matson), a common carrier by water in interstate commerce subject to the Shipping Act, 1916, has petitioned the Commission for a Declaratory Order pursuant to 46 C.F.R. 502.68.[1] The Petition was noticed in the *Federal Register* on October 8, 1976, and Replies were received from the Military Sealift Command, Department of the Navy (MSC) and the Commission's Bureau of Hearing Counsel (Hearing Counsel).[2]

The Petition seeks authority for Matson to capitalize the cost of monies used to acquire a new "071" containership now under construction at Bath Iron Works Corporation.[3] This cost would include net interest paid on borrowed funds (actual interest) *and* income foregone as a result of using existing company funds (foregone interest).[4] Matson also requests the Commission to state that such capitalized interest will be recognized as part of Matson's vessel investment account in all rate making proceedings involving the new "071" vessel *and* future vessels constructed by Matson. In support of this request, Matson states that the maintenance of an "Allowance For Funds Used During Construction" account and the inclusion of interest paid on capital investment funds during construction in a carrier's rate base is consistent with the public utility rate making practices of the Federal Power Commission and many state agencies regulating electric, gas, water and telephone companies. Matson also finds support in certain practices of the Maritime Administration, United States Department of Commerce (MARAD). No information is provided as to why Matson's "071" project differs from other vessel

[1] "Petition of Matson Navigation Company for Issuance of a Declaratory Order Authorizing Capitalization of Funds Used During Vessel Construction" (Petition).

[2] Matson has submitted a Reply to MSC's Reply, a pleading not permitted under the Commission's Rules of Practice and Procedure (46 C.F.R. 502.74).

[3] The first of 27 monthly progress payments was made on April 1, 1976.

[4] Matson wishes the Commission to "defer ruling" on whether it should be allowed to capitalize income foregone on funds derived from deferred federal income taxes.

acquisitions or why this question could not better be resolved by industry wide rule making or case-by-case adjudication.

MSC opposes the issuance of a Declaratory Order and states that Matson's propositions should be examined in one of the Commission's current investigations into Matson rate increases (Docket Nos. 73–22, 75–57 and 76–43). In any event, MSC opposes the capitalization of foregone interest. It also believes Matson should not capitalize actual interest expense until it divulges how it would treat such interest for federal income tax purposes. MSC requests an evidentiary hearing if the Commission were to consider the Petition on the merits.

Hearing Counsel argue that the instant proposal entails too many variables for the Commission to grant a *carte blanche* authorization to capitalize either actual interest or foregone interest. They claim a carrier has numerous options in financing ship construction, all of which can significantly affect its operating results, and that it would be impossible to assess Matson's proposal without first determining the affects of such an authorization on Matson's actual operations. Hearing Counsel also states that the Commission should expressly rule on the propriety of capitalizing interest foregone on funds derived from deferred federal income taxes if Matson's request were to be treated on the merits.

The Petition presents involved questions of policy and fact which are not effectively treated by the issuance of a Declaratory Order and shall therefore be denied. Matson does not request the resolution of a particular controversy or uncertainty arising from past Commission actions, or even allege that a controversy exists. Instead, Matson desires a personal exemption from the Commission's ordinary approach to rate base valuation. Before a conclusion could be reached on such a "Petition for Special Relief," it would be necessary to closely examine the carrier's financial position and rate structure. Matson has furnished us with no public interest reasons for conducting such an examination at this time.

The accounting regulations of the Federal Maritime Commission are not in issue here.[5] Indeed, the Commission does not require carriers to maintain particular types of accounts or an uniform accounting system. General Order 5 (46 C.F.R. Part 511) and General Order 11 (46 C.F.R. Part 512) provide only that carriers using the uniform system of accounts prescribed by MARAD must file annual financial reports based upon the MARAD system.[6] A carrier employing a different accounting system must thoroughly describe that system to the Commission. Whether the capitalization of interest expended for vessel construction reflects "gen-

[5] The two regulations cited in Matson's Petition are those of the MARAD, an agency which requires subsidized carriers to adhere to an uniform accounting system. The first, 46 C.F.R. 282.1(359), provides for the maintenance of a Construction Work in Progress account showing "all payments incident to the costs of vessels . . . in process of construction which are capitalized in accordance with generally accepted accounting procedures." The second, 46 C.F.R. 284.2(b), requires the capitalization of interest incurred during periods of construction (borrowed funds only, less interest earned thereon) for the purpose of paying operating differential subsidies in those relatively rare situations where MARAD permits carriers to recapture capital investment.

[6] 46 C.F.R. 511.15 and 512.7.

erally accepted accounting procedures" within the meaning of 46 C.F.R. Part 282.1(359) is a matter for MARAD to determine.

Accounts or accounting methods acceptable to MARAD may be filed with us. Our General Order 5 and 11 regulations do not state whether interest expenditures incurred during vessel construction should be capitalized or whether Interest During Construction Accounts should be maintained.[7] The annual financial reports merely guide the Commission's staff in its regulatory responsibilities and do not themselves establish the validity of any revenue account, vessel investment account or total rate base calculation. Our major concern is that the methodology employed in preparing the reports (including interest capitalization practices) be plainly identified.

Reasonable rates are determined by establishing a fair rate of return on the fair value of the carrier's property devoted to public service. This return on rate base should be sufficient to cover operating expenses *and* the cost of attracting capital. It would affect the determination of Matson's "fair rate of return" in pending Commission dockets were we to separately decide whether it may capitalize interest expenses for funds used to construct the "071" containership. If Matson wishes to pursue the issues connected with interest capitalization, it should do so on the complete record being compiled in the present adjudicatory proceedings.

Accordingly, IT IS ORDERED, That the "Petition of Matson Navigation Company for Issuance of a Declaratory Order Authorizing Capitalization of the Cost of Funds Used During Vessel Construction" is DENIED.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

[7] The Commission has accepted annual financial reports which included entities for capitalized interest on borrowed capital and those which did not.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-1

CSC INTERNATIONAL, INC.

v.

ORIENT OVERSEAS CONTAINER LINE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION

January 5, 1977

No exceptions having been filed to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on January 5, 1977.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 76-1

CSC INTERNATIONAL, INC.

v.

ORIENT OVERSEAS CONTAINER LINE, INC.

December 13, 1976

ERRATA

Initial Decision on Remand served December 9, 1976.
Page 3—Line 13, change "evicence" to "evidence."
Page 8—Line 21, delete "16 SRR 1575."
Page 8—Line 29, add "16 SRR 1575."

(S) WILLIAM BEASLEY HARRIS,
Administrative law Judge.

FEDERAL MARITIME COMMISSION

No. 76–1

CSC INTERNATIONAL, INC.

v.

ORIENT OVERSEAS CONTAINER LINE, INC.

Reparation denied.

From the record in this case, the description of the complainant's product—Trimet—a resin raw material, rather than a synthetic resin itself, is properly any of the following:

Trimet (complainant's trademark on polytrimethylolethane); or

Trimet, Technical Trimethylolethane; or

Technical Trimethylolethane (Trimethylolethane is a trifunctional polyhydric alcohol with all of the hydroxic groups being primary alcohol functions.

The claim for reparation is for alleged overcharge in violation of section 18(b)(3) of the Shipping Act, 1916, for transportation of goods from New York to Keelung under two Bills of Lading. B/L NYCT–56 dated December 21, 1973, and B/L NYCT–11 dated January 28, 1974, each was for the shipment of Trimet; however, it was described on B/L NYCT–56 (Exh. 1) as "Synthetic Resin" and on B/L NYCT–11 (Exh. 2) as "Chemicals NOI (Organic Chemicals) (Technical Trimethylolethane)." Under Rule 4 of the respondent's tariff the carrier must compare the commodity description on the bill of lading with the description on the shipper's Export Declaration. The description on B/L NYCT–56 compared with shipper's Export Declaration reflected a Schedule-B number 512–0917, which defines the cargo as "Synthetic Alcohols, chemically defined, Monohydric, NFC." The description on B/L NYCT–11 in comparison with shipper's Export Declaration—Trimethylolethane, checked in commodity description in Schedule-B number 512–0917 was specified. Respondent applied ocean freight rate of $91.25 W or M as covered by Item 575 of its tariff to B/L NYCT 56 "Alcohol N.O.S., not dangerous or hazardous." On B/L NYCT–11 respondent through clerical error applied ocean freight rate of $81.00 W or M, as covered by Item 2187 of its tariff "Chemicals, Organic, N.O.S." when correct assessment of Item 575 "Alcohols, N.O.S." $91.25 W or M should have been made. Under the circumstances of this case, Rule 4 of respondent's tariff was and should have been used to aid in testing what can *now* be proved *was actually shipped*, based on all the evidence. "Alcohol N.O.S., not dangerous or hazardous," Item 575 of tariff, seems to be proper. There is no overcharge but an undercharge which respondent should seek from claimant and keep Commission posted as to such endeavors.

It is well settled that a cause of action based upon a claim for reparation accrues at the time of shipment or upon payment of freight charges, whichever is later. The freight charges in this instance were collected on April 2, 1974, as to B/L NYCT–11 and on

July 2, 1974, as to B/L NYCT-56, at which time, respectively, the cause of action accrued.

The complaint seeking reparation was filed with the Commission on December 29, 1975, and is within the two year statutory period of section 22 of the Shipping Act, 1916.

William Levenstein for complainant.

Robert G. Jufer, a practitioner before the Commission, for respondent.

INITIAL DECISION ON REMAND OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE[1]

The Commission's July 12, 1976, remand of this proceeding to the Presiding Administrative Law Judge was for such action, including a hearing, as he deemed necessary (Order on Remand, p. 4). The prior proceedings in which the March 9, 1976, Initial Decision issued was conducted under the Shortened Procedure provided for in the Commission's Rules of Practice and Procedure, 46 CFR 502.151 et seq. The Presiding Administrative Law Judge deemed it best that this remand proceeding be given full hearing and briefing treatment.

PROCEDURAL BACKGROUND SINCE REMAND

Pursuant to Rule 6(d) of the Commission's Rules of Practice and Procedure, 46 CFR 502.94, notice was served July 14, 1976, for a prehearing conference to be held August 5, 1976. The respondent attended the August 5, 1976, prehearing conference, however, no one appeared for the complainant. The respondent moved for dismissal of the complaint (Prehearing Conference transcript, p. 5). The Presiding Administrative Law Judge took the motion under advisement, at the same time directing the respondent to reduce the motion to writing with reasons in support, a copy to the complainant. The respondent never submitted the motion in writing. The motion to dismiss the complaint was denied without prejudice (Notice served August 17, 1976). The respondent's request that a hearing in this proceeding be held within thirty (30) days was granted; hearings were scheduled to commence on September 2, 1976. (*Ibid.*)

Hearing in this remanded proceeding commenced and concluded in Washington, D. C., on September 2, 1976. The official stenographic transcript of testimony thereof consists of twenty-five (25) pages. One witness was presented. Four (4) exhibits were received in evidence, numbered 1, 2, 3 and 4.

In accordance with Rule 10(cc) of the Commission's Rules of Practice and Procedure, 46 CFR 502.169, the above-mentioned transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitute the exclusive record for facts and decision.

The parties at the hearing (Tr. 24) agreed to and adhered to a briefing schedule of an opening brief filed by the complainant on or before October 4, 1976; a reply brief filed by the respondent on or before

[1] This decision became the decision of the Commission January 5, 1977.

November 4, 1976; a closing brief filed by the complainant on or before November 22, 1976.

FACTS

From the record herein the Presiding Administrative Law Judge finds the following facts:

1. The complainant, CSC International, Inc. (CSC), is a Delaware corporation, located in New York, whose principal business is the manufacture and distribution of chemicals and chemical products. CSC alleges it has been subjected to payment of a freight rate for transportation, under two Bills of Lading, which is unjust and unreasonable and in violation of section 18(b)(3) of the Shipping Act, 1916, for which reparation is sought from the respondent.

2. The respondent, Orient Overseas Container Line, Inc. (OOCL), is a common carrier by water engaged in transportation of cargo between U.S. North Atlantic ports and ports in Taiwan and as such is subject to the provisions of the Shipping Act, 1916, as amended.

3. Under Bill of Lading No. NYTC–56 dated December 21, 1973, CSC shipped at New York on OOCL's vessel *SS Taeho* for transportation to Keelund "6 Pallets said to contain 220 bags Synthetic Resin of a gross weight of 11,165 pounds, measuring 354 cft." The goods were consigned to the order of Hua Nan Commercial Bank Ltd., Taipei, Taiwan (Exh. 1).

4. The respondent carrier, as to B/L NYCT–56, after comparing the shipper's commodity description thereon with the shipper's Export Declaration commodity description per the tariff Rule 4, applied Ocean Freight rate of $91.25 W or M as covered by Item 575 of its U.S. Atlantic and Gulf Ports/Far East Tariff—OOCL Tariff FMC 6, "Alcohol N.O.S., not dangerous or hazardous." The total freight paid by CSC was $807.56.

5. The respondent admits that the charges for the freight under B/L NYCT–56 were collected July 2, 1974 (Tr. 15, 16). The cause of action as to it accrued as of July 2, 1974.

6. Under Bill of Lading No. NYTC 11 dated January 28, 1974, CSC shipped at New York on OOCL's vessel *SS Oriental Leader* for transportation to Keelung "22 Pallets said to contain: 860 Bags Chemicals NOI (organic chemicals) (Technical Trimethylolethane)" of a gross weight of 43,645 pounds, measuring 1,299 cft. The goods were consigned to the order of the First Commercial Bank of Taiwan (Exh. 2).

7. The respondent carrier as to B/L NYCT–11, after comparing the shipper's commodity description thereon with the shipper's Export Declaration commodity description, per respondent's tariff Rule 4, through clerical error, applied Ocean Freight rate of $81.00 W or M, as covered by Item 2187 of the tariff "Chemicals Organic N.O.S." when correct assessment of Item 575 "Alcohol N.O.S." $91.25 W or M should have been made. The total freight paid by CSC was $2,630.48 + $211.29 Bunker S.C. equals $2,841.57.

8. The respondent admits that the charges for the freight under B/L NYCT–11 were collected April 2, 1974 (Tr. 15, 16). The cause of action as to it accrued as of April 2, 1974.

9. Synthetic resin is a polymer, produced by the chemical reaction of one or more monomers, which react together and form a molecular-weight product.

10. Trimethylolethane is a trifunctional polyhydric alcohol with all of the hydroxic groups being primary alcohol functions; the primary use of this material is a real material making polyester. Polyester will be a resin.

11. Trimet, a resin raw material (Tr. 10), rather than a synthetic resin itself (Tr. 11), is CSC's trademark on the polytrimethylolethane. The general process for using Trimet to make a polyester resin is, the polyhydric alcohol is combined in a certain molecular proportion with polycarboxylic acid and with other polyalcohols and with possibly monocarboxylic acid, heated together, the water reaction is removed and the product is the polyester.

DISCUSSION

The Commission's July 12, 1976, order remanded this proceeding to the Presiding Officer to issue supplemental findings and conclusions on:

1. When the cause of action accrued;
2. Whether the parties did apply, or if not, why the parties should not apply Rule 4 of the carrier's North Atlantic/Far East Tariff FMC–6; and
3. What is the proper description of complainant's product.

WHEN THE CAUSE OF ACTION ACCRUED

The respondent OOCL admits and concedes the claim for reparation, filed December 29, 1975,[2] as to each Bill of Lading, was filed within the two (2) year statutory period provided in section 22 of the Shipping Act, 1916 (Tr. 15, 16). Charges for the B/L NYTC–56, dated December 21, 1973, were collected July 2, 1974; and for B/L NYTC–11, dated January 28, 1974, charges were collected April 2, 1974. The Commission pointed out in its July 12, 1976, order remanding the proceeding, it is well settled that a cause of action based upon a claim for reparation accrues at the time of shipment or payment of freight charges, whichever is later. In this instance the payment of freight charges was later than the time of shipment of the goods, so the cause of action accrued when the charges were collected.

Whether the parties did apply, or if not, why the parties should not

[2] The jacket in this docket contains part of a wrapping, apparently that in which the complaint was mailed, showing a postmark of New York, N.Y., December 23, 1975. The complaint bears a stamp "Received December 29, 1975, Federal Maritime Commission" and a stamp "Received 1975, Dec. 30 P.M. 3:40 Federal Maritime Commission Office of the Secretary." The Commission noted in its July 12, 1976, Order on Remand that the March 9, 1976, Initial Decision stated the complaint was filed with the Commission on December 30, 1975, however, the date of receipt stamped on the complaint is December 29, 1975. Henceforth the first date of receipt stamped shall be regarded as the filing date.

apply Rule 4 of the carrier's North Atlantic/Far East Tariff FMC-6 (Rule 4 of the tariff in question provides, "Description of commodities on all copies of the Bill of Lading shall be verified by a comparison with the description on the corresponding shipper's export declaration which shall determine the rate to be applied."), CSC argues that since the respondent did not adduce any evidence on that question, CSC is in no position to comment on the effect of the application or nonapplication of that rule by the carrier (CSC's opening brief, p. 3). OOCL on the other hand, argues that under provisions of Rule 4 of OOCL Tariff FMC-6 the carrier must compare the shipper's commodity description in the bill of lading with the description in the shipper's Export Declaration. OOCL repeats at p. 3 of its brief its letter dated January 14, 1976, which was subsequently served January 22, 1976, as its answer to the complaint that "On B/L NYTC-56 shipper described cargo as "Synthetic Resin' however the U.S. Customs Export Declaration also prepared by the shipper reflected a Schedule B number 512-0917 which defines the cargo as 'Synthetic Alcohols, Chemically Defined, Monohydric, N.E.C.' We accordingly applied the ocean freight rate of $91.25 W or M as covered by Item 575, OOCL Tariff FMC-6 under description of 'Alcohol N.O.S., not dangerous or hazardous.' " And, that "On bill of lading NYTC-11 shipper described cargo as 'Chemicals, N.O.I. (organic chemicals) (Technical Trimethylolethane)' and the U.S. Customs Export Declaration reflected Schedule B number 512-0917, also upon checking commodity description 'Trimethylolethane' in Schedule B classification no. 512-0917 was specified. Through clerical error, Item 2187 covering 'Chemicals, Organic, N.O.S.' was assessed at $81.00 W or M when correct application would have resulted in assessment of $91.25 W or M rate of Item 575 'Alcohols, N.O.S.' "

OOCL argues that with the detailed information required on the Export Declaration and the penalty involved for intentionally stating false information thereon, OOCL feels that the application of Rule 4 of OOCL Tariff FMC-6 requiring the carrier to verify the bill of lading commodity description with the Shipper's Export Declaration and to assess charges based on such description would eliminate violations of section 18(b) of the Shipping Act, 1916.

CSC in giving its views in general on such rules as Rule 4, contends the carrier's bill of lading is the contract of affreightment; that the export declaration is prepared for a reason other than the transportation transaction between the shipper and carrier, and that there is no authority to use Export Declarations as extensions of the bill of lading. CSC argues it is really immaterial that the bill of lading description and the Export Declaration description are the same or different and separate. And, CSC says further that Rule 4 gives the carrier the possible right to assess charges on a commodity it did not in fact carry without requiring any inquiry when there is a difference between the bill of lading description and the Export Declaration description. (CSC opening brief, p. 4).

While CSC argues the respondent adduced no evidence on the second question on remand, the record herein shows that the respondent early on showed comparison had been made by it with the Export Declaration of CSC and the bills of lading as evidenced by OOCL's letter of January 14, 1976, and the Answer to the Complaint. At no time did the complainant dispute the comparison and the results thereof. Unfortunately neither the complainant nor the respondent submitted or offered for receipt in evidence the Export Declaration. Perhaps CSC did not want the Export Declaration in this record, since CSC argues there is no authority to use Export Declarations as extensions of the bill of lading. CSC well may be right if the use of the Export Declaration was an extension of the bill of lading. The use as described in the Tariff's Rule 4 is not an extension of the bill of lading, but a check and balance similar to the checks and balances the various branches of Government exercise under the U.S. Constitution. 16 SRR 1575.

It seems that some check and balance is desirable, especially in this age of containerization and "the test is what claimant can now proved based on all the evidence as to what was actually shipped, even if the actual shipment differed from the bill of lading description. In rating a shipment the carrier is not bound by shipper's misdescription appearing on the bill of lading. . . ." (See *Kraft Foods v. Moore McCormack Lines, Inc.*, Docket No. 73–44, Commission Report on Remand served November 24, 1976).

The Presiding Administrative Law Judge finds and concludes for the above reasons that the respondent did apply and should have applied to the shipments in question Rule 4 of its tariff. The application of said Rule 4 seems to have conformed with its provisions.

THE PROPER DESCRIPTION OF COMPLAINANT'S PRODUCT

CSC says, "The evidence in this case is clear and uncontroverted. Trimet (complainant's trade name for Trimethylolethane) is used to make polyester, a synthetic resin, and is a resin raw material." (CSC's opening brief, p. 4)

According to CSC the freight rate as to B/L NYTC–56 assessed by OOCL was $91.25 per 50 cft at an undesignated tariff provision which covers presumably movements classified as Chemicals N.O.S. under the Far East/North Atlantic Port Tariff of OOCL." The total freight paid by CSC was $807.56.

CSC claims the shipment should have been described on B/L NYCT–56 as 5 (B/L says 6) pallets said to contain 220 Bags Synthetic Resin (Technical Trimet) and rated $71.50 per 2000 lbs. as per the provision for Synthetic Resin compound or powder, non-hazardous, N.O.S. Synthetic Resin in raw material form, for a total freight of $399.15. CSC's overcharge claim is derived from the $807.56 paid as freight charges July 2, 1974, subtracting $399.15 which CSC claims as the correct freight

charge, which leaves $408.41 for which CSC seeks reparation as to B/L No. NYCT–56.

According to CSC the freight rate assessed as to B/L NYCT–11, by OOCL was "$81.00 per 40 cft as per provision for Chemicals NOI under the North Atlantic Far East Tariff of OOCL" (This is Item 2187, 11th Rev. Page 83, effective January 15, 1974, of Orient overseas Container Line, Tariff Far East/North Atlantic Ports, FMC 6—Chemicals organic NOS (not hazardous or dangerous) W/M to Keelung $81.00). The total freight paid by CSC was $2,630.48 + $211.29 Bunker S/C = $2,841.57.

CSC claims the shipment should have been described on B/L NYTC–11 as 22 pallets said to contain 860 bags Synthetic Resin N.O.S. (Technical Trimet) and rated as $71.50 per 2000 lbs., as per the provision for Synthetic Resin, compound or powder, non-hazardous, N.O.S. Synthetic Resin in raw material form of the OOCL North Atlantic/Far East Tariff, for a total freight of $1,560.31 + $141.85 Bunker S/C = $1,702.16. CSC's overcharge claim is derived by subtracting from the $2,841.57 paid April 2, 1974, $1,702.16 leaving $1,139.41, for which CSC seeks reparation as to B/L NYCT–11.

OOCL argues that Technical Trimet (CSC's trade name for Trimethylolethane) described by CSC as "Trifunctional polyhydric alcohol with all of the hydroxic groups being primary alcohol functions" and it is a raw material used in the manufacture of these synthetic resins, rather than a synthetic resin itself, is not a synthetic resin. OOCL contends that trimethylolethane is not defined in the Chemical Dictionary as a Synthetic Resin; that CSC in its complaint herein defines Technical Trimet as the raw material base for polyester and alkyd resins. OOCL also quotes from CSC's brochure (attachment 4 to complaint) "Trimet, technical is used also in other areas such as synthetic lubricants, oil-modified polymethanes, plasticizers and in organic synthesis." OOCL contends that Technical Trimet is a chemical or component part of synthetic resin as well as a component used in manufacture of other products (OOCL brief, p. 7).

CSC presented the only witness in this proceeding, Dr. Philip J. Baker, Jr., a holder of a PH.D degree in organic chemistry, who was originally hired in the research department of CSC in September of 1940 and worked in the Research and Development Division for 25 years, then transferred to his present employment in the technical staff of the Corporate Marketing Services, Inc., Chemical Group, Incorporated, Terre Haute, Indiana (Tr. 7, 8). Dr. Baker defined trimethylolethane as a trifunctional polyhydric alcohol with all of the hydroxic groups being primary alcohol functions, whose principal use is a real material making polyesters (Tr. 9), a resin. Trimet, CSC's tradename on polytrimethylolethane, a resin raw material, rather than a synthetic resin itself (Tr. 11), is used to make a polyester resin. In the general process for using Trimet to make a polyester resin, the polyhydric alcohol is combined in a certain molecular proportion with polycarboxylic acid and with other poly

alcohols and with possibly monocarboxylic acid, heated together, the water reaction is removed and the product is the polyester (Tr. 10).

The Presiding Administrative Law Judge finds and concludes from the record in this case that the proper description of complainant's product is:

Trimet—its registered tradename, or
Trimet, Technical Trimethylolethane, or
Technical Trimethylolethane

Trimethylolethane is a trifunctional polyhydric alcohol with all of the hydroxic groups being primary alcohol functions. It and Trimet are resin raw materials rather than a synthetic resin itself, combined in a certain molecular proportion with polycarboxylic acid and with other poly alcohols, heated together, the water reaction removed and the product is the polyester.

CSC in its Reply Brief (Closing Brief) argues, the evidence shows, and the respondent concedes, that the product is a synthetic resin raw material. CSC does not point to where in this record OOCL has made such a concession. OOCL disputes that the commodity shipped is a synthetic resin saying the commodity is merely a product which is used in the manufacture of synthetic resin as well as other products.

CSC argues that respondent's tariff provides a rate for "Resin, Synthetic" and that the "Note" in Item 1650 (sic) (Exh. 3 refers to Item No. 7650) of the tariff states that that description and rate refers "only to the raw material." And, that the product is such a raw material. (*Ibid,* p. 2). On the other hand OOCL says regarding application of this notation that CSC has changed the meaning by quoting OOCL's tariff out of context "As used in this item, synthetic resin refers only to the raw material." OOCL says when reading this notation it must be considered in its entirety, and that "raw material" must be interpreted as synthetic resin material still in its original state, before processing or manufacture and does not refer to the components or ingredients of synthetic resin. (OOCL Brief, p. 8).

OOCL argues that on B/L No. NYTC–56 (Exh. 1) the shipper described the cargo as "Synthetic Resin." However, the Export Declaration also prepared by the shipper reflected a Schedule B number 512–0917 which defines the cargo as "Synthetic Alcohols, Chemically Defined, Monohydric, N.E.C.," that OOCL applied the ocean freight rate of $91.25 W or M as covered by Item 575, OOCL Tariff FMC–6 under description of "Alcohol, N.O.S., not dangerous or hazardous. On B/L NYTC–11 (Exh. 2) the shipper described the cargo as "Chemicals N.O.I. (Organic Chemicals) (Technical Trimenthylolethane)." However, the Export Declaration reflected Schedule B number 512–0917. OOCL says through clerical error, Item 2187 covering "Chemicals, Organic, N.O.S." was assessed at $81.00 W or M when correct application would have resulted in assessment of $91.25 W or M rate of Item 575 "Alcohols, N.O.S."

CSC proposed as finding of fact No. 6 (opening brief, p. 2), "At the time these shipments moved the respondent's tariff, Orient Overseas Container Line Tariff FMC–6, published in Item 1650 (sic) (Item 1650 refers to Brooms corn) a rate of $48.50 for the December 21, 1973, shipment and $55 W for the January 28, 1974, shipment on 'Resin, Synthetic.' Bunker surcharges of $2 and $6.50 per ton respectively are provided on 3rd Rev. Page 1A and 4th Rev. Page 1–A, respectively." (Exh. 3 is a copy of OOCL's tariff 6th Rev. Page 133–A effective June 1, 1973, covering Item No. 7650) CSC contends that from the evidence and the tariff, the proper charges should be computed as follows:

B/L NYTC–56—11,165 pounds at $48.50 per 2000 pounds plus $2 per 2000 pounds = $281.70. Paid $807.56. Should be $281.70. Carrier paid $525.86.

B/L NYTC–11—43,645 pounds at $55 per 2000 pounds plus $6.50 per 2000 pounds = $1,341.93. Paid $2,841.57. Should be $1,341.93. Carrier paid $1,499.64. Total amount overpaid $2,025.30.

The Presiding Administrative Law Judge upon consideration of the above, *finds* and *concludes* that he agrees with OOCL's contention that Trimet is an ingredient of synthetic resin; and is not raw material that OOCL's tariff Item 7650 contemplates and CSC would have applied. As Dr. Baker testified, Trimet is a resin raw material rather than a synthetic resin itself. The description stated to be on the Export Declaration of Synthetic Alcohols and the testimony that trimethylolethane is a trifunctional polyhydric alcohol with all of the hydroxic groups being primary alcohol functions does not compare favorably with the B/L NYTC–56 (Exh. 1) description of the goods as synthetic resin, and seems to justify the application by OOCL of the ocean freight rate of $91.25 W or M as covered by Item 575 of the tariff in question, under "Alcohol, N.O.S., not dangerous or hazardous." Thus it is concluded as to B/L NYTC–56 there should be no reparation.

The Presiding Administrative Law Judge also is in agreement with OOCL that the same Item 575 of the tariff should have been applied to B/L NYTC–11 (Exh. 2). OOCL asserts Item 2187 was applied through clerical error. Application of Item 575 would be a revision upward, the shipper having paid less under Item 2187 then Item 575 of the tariff requires. However, the carrier must pursue collection of the undercharge other than in the Commission. At the same time the carrier must report to the Commission what steps it takes to collect the undercharge and the results thereof.

FINDINGS AND CONCLUSIONS

Upon consideration of all the aforesaid, the Presiding Administrative Law Judge *finds and concludes*, in addition to the findings and conclusions hereinbefore stated, that,

CSC is not entitled to an award of reparation, and its request for reparation should be denied.

Wherefore, it is ordered, subject to review by the Commission as provided in the Commission's Rules of Practice and Procedure, that,

(A) CSC's claim for reparation be and hereby is denied.

(B) OOCL shall promptly and fully inform and advise the Commission of the receipt or non-receipt of payments due it by virtue of the undercharge herein, and, if necessary, shall pursue to collect the same in the appropriate legal form again keeping the Commission promptly and fully advised so that OOCL and the Commission can meet the on-going responsibility imposed by the Shipping Act, 1916.

(C) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS,
Administrative Law Judge.

WASHINGTON, D.C.,
December 9, 1976.

FEDERAL MARITIME COMMISSION

DOCKET NO. 72-40

PUBLICATION OF DISCRIMINATORY RATES IN THE U. S. NORTH ATLANTIC/CONTINENTAL EUROPEAN TRADE

ORDER OF DISCONTINUANCE

January 10, 1977

This proceeding was instituted in August, 1972, by order to show cause for the purpose of eliminating inbound/outbound ocean rate disparities in the U. S. North Atlantic/Continental European trade. Pursuant to subsequently adopted procedures many of the items of alleged disparity were eliminated from the proceeding either through rate changes by conference respondents or by satisfactory demonstration that no meaningful disparity existed. However, in spite of the length of time these procedures have been followed the proceeding has not been concluded as to all items of disparity.

Considering the length of time since institution of this proceeding and the very real possibility that subsequent rate actions have either eroded previous remedial rate actions, created new disparities on other items or eliminated disparities, it appears that continuation of this proceeding in its present posture would serve little useful purpose. We have reexamined our approach to the disparity problem and have determined that other approaches should be used whereby meaningful disparities can be identified and eliminated.

Accordingly, it is ordered that proceedings in this matter are hereby discontinued.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-16

MSA INTERNATIONAL

v.

CHILEAN LINE

Reparation awarded

William Levenstein for the Complainant.

Roger Quinones for the Respondent.

REPORT

January 13, 1977

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett, Bob Casey and James V. Day, *Commissioners*)

This proceeding is before the Commission on exceptions filed by Complainant, MSA International to the Initial Decision of Administrative Law Judge Charles E. Morgan denying reparation for alleged freight overcharges by the Respondent, Chilean Line, on three shipments of mine safety hats carried by Respondent from New York to Antofogasta under bill of lading dated November 1, 1974, and from New York to Valparaiso under bills of lading dated Jaunary 13 and January 23, 1975, respectively.

The three shipments, described in the shipping documents as "safety hats," "Topgard hats," and "V-Gard caps," respectively, were assessed the Class 1 rate of $153.75 per metric ton applicable to "Hats, N.O.S." Aggregate freight charges amounted to $4,869.64.

Complainant contends that the safety hats were protective head coverings for miners and should have been classified as "Helmets N.O.S." for which Respondent's tariff provided a class 7 rate of $130.00 per metric ton[1] and that by collecting charges in excess of those provided in the applicable tariff Respondent violated section 18(b)(3) of the Shipping Act, 1916 (the Act).

[1] Ninth Rev. page 166 of the Atlantic and Gulf/West Coast of South America Conference Freight Tariff FMC No. 1.

Respondent denies it had rated the shipments incorrectly and points to a dictionary definition which in describing "safety hats" makes no reference to helmets.

The Presiding Officer reviewed the descriptions of the goods in the shipping documents and concluded that the great preponderance of the evidence showed that the shipment consisted of safety hats. He accordingly dismissed the complaint.

While there is no doubt that the articles shipped were safety hats, the question here is whether they should have been classified and rated as helmets. By dictionary definition, a hat is "a covering for the head . . .;" [2] a safety hat is "a hat of steel or similar material worn (as by miners or sandhogs) to protect the top of the head[3] . . ." and a helmet is described as "any of the various protective head coverings made of hard material . . . to resist impact." [4] Thus, as distinguished from hats, described simply as head coverings, safety hats and helmets share the common characteristic of being *protective* head coverings made of materials capable of resisting impact to avoid injury to the wearer.

Mine Safety Applicances Company the shipper, describes its Topgard hats and V-Gard caps as "Rugged, economical head protection" "Built for use . . . [in] industries where protection from falling objects or overhead hazards is necessary." This illustrates the purpose for which these safety hats were to be used.

A reasonable reading and comparison of these definitions and descriptions lead us to conclude that, for tariff purposes, these safety hats are more akin to helmets than to hats and should have been classified and rated as helmets. By failing to so classify and rate the shipments and by assessing the rate applicable to Hats, N.O.S., Respondent violated section 18(b)(3)of the Shipping Act, 1916.

In light of the foregoing, the Initial Decision in this proceeding is hereby reversed and Complainant is awarded reparation in the amount of $752.22, which represents the difference between freight based on the rates applicable to Hats, N.O.S. and Helmets, N.O.S.

No interest on that amount is awarded as the carrier's misclassification of the cargo was due to a great extent to the shipper's failure to properly describe its product in the shipping documents prepared by it or by its agents on its behalf.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

[2] Webster New World Dictionary, p. 640 (1970).
[3] Webster International Dictionary Unabridged, p. 1998 (1964).
[4] *Idem*, p. 1052.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-44

E.S.B. INCORPORATED

v.

MOORE MCCORMACK LINES, INC.

ADOPTION OF INITIAL DECISION

January 17, 1977

This proceeding is before the Commission on exception from Complainant, E.S.B. Incorporated, to the Initial Decision of Administrative Law Judge William Beasley Harris in which he determined that Respondent Moore McCormack Lines, Inc., had not violated section 18(b)(3) of the Shipping Act 1916, by collecting freight charges in excess of those provided in its tariff for the transportation of synthetic resin from Philadelphia to Santos, Brazil. No reply to the exception was received.

Complainant excepts to (1) the denial of its motion for judgment on the pleading and (2) the denial of reparation.

After a careful examination of the record, we concur with the Presiding Officer's findings and ultimate conclusions, and adopt his Initial Decision subject to the discussion below.

As to Complainant's first contention on exception, the record shows that the complaint was served on Respondent by mail on October 29, 1975. The Commission's cover letter, although stating that Complainant had requested the shortened procedure provided in Rule 11 (46 C.F.R. 502.181) of the Commission's Rules of Practice and Procedure (the Rules), referred by error to the "informal procedure" under which the answer to the complaint should be filed. In reply, Respondent filed an affidavit received by the Commission on November 20, 1975, consenting to the informal procedure under Subpart S of the Rules (46 C.F.R. 502.301).[1] As the amount claimed exceeded $5,000.00, the Presiding Officer advised Respondent by letter of November 21, 1975 that the informal procedure was inapplicable and that Complainant had requested the shortened procedure. This was a necessary clarification of the misunderstanding as

[1] Subpart S (46 C.F.R. 502.301, *et seq.*) of the Commission's Rules of Practice and Procedure provides for an informal proceeding conducted by a settlement officer for the adjudication of claims not in excess of $5,000.00.

to what procedure Respondent was asked to consent to. The Presiding Officer also urged Respondent to enter an appearance in the case. We consider this a grant of an extension of time for Respondent to state whether it consented to the shortened procedure and to answer the complaint. The Presiding Officer had such power under Rule 10(g) (§502.147), and once Respondent consented to the shortened procedure, Rule 5 was inapplicable so that permission from the Commission or the Chief Administrative Law Judge to grant the extension was unnecessary.[2]

By letter dated December 2, 1975, Respondent filed its answer to the complaint and consent to the shortened procedure which was received at the Commission on December 4, 1975, and thereafter, upon request from the Secretary, filed the additional number of copies required.

We have recognized, and courts have long held that "even when acting in quasi-judicial capacity, the strict rules which prevail in suits between private parties" and "the hard and fast rules as to pleadings which govern courts of law" do not apply to administrative proceedings where "inquiries should not be too narrowly constrained by technicalities." *Oakland Motor Co. v. Great Lakes Transit Corp.*, 1 U.S.S.B.B. 308, 311 (1934).

As the Presiding Officer noted, Respondent was unaware of the procedural requirements, but when instructed how to proceed, Respondent did make what appears to be a good faith effort to comply with the Commission's rules. Moreover, the complaint here, alleging as it does a violation of the statute by the carrier, raises issues of fact which may not be resolved by default but must be properly established on the basis of all the evidence available. Under these circumstances we find that the Presiding Officer had the authority to grant an extension of time and did not act arbitrarily in accepting the filing of Respondent's answer.

Turning to the question of whether the Gaylord cartons in which the synthetic resin was packed, were crated in wood, Complainant contends that the Presiding Officer held the bills of lading to be the sole proof of the transaction between the parties, to the exclusion of all other evidence. The Commission has said in *Western Publishing Co. v. Hapag Lloyd, A.G.*, 13 S.R.R. 16 (1972), that even though the bill of lading sets forth the terms and conditions of the contract of affreightment, it is not conclusive as to the description of the goods shipped, so that a shipper who challenges that description, may introduce whatever evidence he has to prove his allegations as to what actually moved, even where the bills of lading and other shipping documents were prepared by the shipper or his agent. This the Presiding Officer recognized and although it appears that he took notice of the "various descriptions" of the cargo in all of the shipping documents introduced in evidence, the emphasis placed on the importance of the bill of lading could be misleading.

[2] Rule 11(i), 46 C.F.R. 502.183 reads in part: "If the respondent *does not consent* to the proceeding being conducted under the shortened procedure provided in this subpart, the matter will be governed by Subpart E of this part (Rule 5). . . ." (Emphasis added.)

Complainant relies principally on letters from the packers and on the annotation "wood box" on one of the packing lists to show that the cartons were in fact crated, and thus qualified for the lower rate claimed. The three letters from the Shipside Packing and Consolidation Co., Inc., all dated September 11, 1975, assert that the shipments of "Gaylord cartons were packed in wooden crates." There is no reference in these letters to any records prepared at the time the cartons were packaged, upon which the statements in the letters are based, or any mention of the date the packaging was done. Furthermore, Complainant did not answer Respondent's argument that had the cartons been crated, the measurements on the packing lists and those shown in the Shipside Company's letters and on the bills of lading could not have been identical. In its Reply to Respondent's answer Complainant merely states that the measurements on the bills of lading reflect those in the Shipside Company's letters.

Furthermore, Complainant's three packing lists, which bear the dates of June 21 and 28, 1974, and July 25, 1974, respectively,[3] describe the shipments as 40 "box"; 40 "wood box"; and 40 "Pallet Box." In none is there any mention of *crated* cartons or boxes.

Moreover, in referring to the photograph in the record showing a skidded Gaylord carton, Complainant states that "since this was a one-time order, no photograph of the completed crates were made." There is no explanation why this "one-time order" required special packaging.

In light of the foregoing and Complainant's failure to mention wood crating in *any* of the shipping documents prepared at the time of shipment, we agree with the Presiding Officer's finding that there is insufficient evidence to sustain the claim that the Gaylord cartons were in fact not only skidded but also externally crated on all sides. We therefore concur with the Presiding Officer's ultimate conclusion that Complainant has not met its burden of proof. Having so found, it is not necessary to decide whether packing in wooden crates would satisfy the tariff requirement for "in wooden cases," or whether the tariff is ambiguous in this respect.

Exceptions not specifically discussed have nevertheless been reviewed and found to be a reargument of contentions considered and properly disposed of by the Presiding Officer or to be without merit.

Accordingly, we adopt the Initial Decision, a copy of which is attached hereto and made a part hereof.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

[3] The packing lists bear a stamp showing that they were received at Complainant's Traffic Department on the above dates. As evidenced by the bills of lading, the shipments were delivered to the carrier on September 20, 1974.

FEDERAL MARITIME COMMISSION

No. 75-44

E.S.B. INCORPORATED

v.

MOORE MCCORMACK LINES, INC.

Adopted January 17, 1977

Reparation denied

William Levenstein, for the Complainant.

John D. Straton, Jr., Respondent's Manager—Rates & Conferences, for the Respondent.

INITIAL DECISION OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE[1]

This is a complaint case in which the sum of $16,489.58 plus interest from the date of payment thereof is sought by E.S.B., Incorporated (E.S.B.) from Moore McCormack Lines, Inc. (McCormack) a common carrier by water in foreign commerce, as reparation for payment by E.S.B. to McCormack, of freight charges, allegedly in excess of those chargeable under Inter-American Freight Conference—Section A—Tariff No. 3 (FMC No. 7), in violation of Section 18(b)(3) of the Shipping Act, 1916, as amended, for transportation of three shipments of Synthetic Resin, under Bills of Lading dated September 20, 1974, on McCormack's vessel *Mormacrigel*, from Philadelphia, Pennsylvania to Santoz, Brazil.

This proceeding was conducted under the Shortened Procedure, Rule 11(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.181. The procedural background herein, is hereinafter set forth to aid in the understanding of what occurred in this instance, as well as to indicate upon what material the found facts are based for the findings and conclusions herein.

PROCEDURAL BACKGROUND

Counsel for E.S.B. signed the complaint herein dated and filed October 22, 1975. (Under Rule 8(b)(a) of the Commission's Rules of Practice and

[1] This decision became the decision of the Commission January 17, 1977.

Procedure, 46 CFR 502.112, the signing of the complaint by the attorney constitutes a certificate by him that he has read the pleading, document or paper; that he is authorized to file it; that to the best of his knowledge, information and belief there is good ground to support it; except when otherwise specifically provided by rule or statute, the pleading, document or paper so signed need not be verified or accompanied by affidavit.) Counsel attached to the complaint his verification, sworn to under date of October 24, 1975. The complaint was served October 29, 1975, and notice thereof was published in the Federal Register November 4, 1975, page 51224, Vol. 40, No. 213. The complaint (page 5) asked for application of "the Shortened Procedure, pursuant to the Commission's Rule 11."

The Respondent, McCormack, in a letter dated November 18, 1975 (received November 20, 1975) stated, "We enclose herewith our authorization for informal procedure by the Commission of the above cited subject." The said authorization, notorized, was "to determine the . . . claim in accordance with Subpart S (46 CFR 502) of the Commission's informal procedure for adjudication of small claims subject to discretionary Commission review." The Presiding Administrative Law Judge in a letter dated November 21, 1975, to the respondent, copy to all parties, pointed out the inconsistency of the authorization for the Small Claims procedure (Small Claims are for $5,000 or less (46 CFR 502.301)) when this claim is for $16,489.58, for which the complainant requested use of the Shortened Procedure, under Rule 11(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.181.

Those representing the parties telephoned the Presiding Administrative Law Judge on or about November 26, 1975, anent having received the letter aforementioned.

The Complainant on December 1, 1975, filed a motion, pursuant to Rule 5(d) of the Commission's Rules of Practice and Procedure, 46 CFR 502.64, for judgment on the pleadings, on the grounds that no answer to the complaint had been filed or served upon the complainant within twenty (20) days after October 29, 1975, the date of service of the Complaint. (Under Rule 11(c), 46 CFR 502.183, if the respondent consents to the shortened procedure, the answering memorandum of the respondent is to be served within twenty-five (25) days after date of service. In this instance, by November 24, 1975).

A letter, dated December 2, 1975, was received from the respondent December 4, 1975, stating, "With reference to your letter of November 21, 1975, and our telephone conversation of November 26, 1975, enclosed is our answering memorandum to the above complaint. The writer apologizes for any delay that may have been incurred." (Under the date of December 11, 1975, the Secretary of the Commission wrote to the respondent acknowledging receipt of the answer and requesting submission by the respondent of additional copies thereof as directed by 46 CFR 503.118.

On December 10, 1975, E.S.B. filed a memorandum in reply to

McCormack's answer in which E.S.B. renewed its motion for judgment on the pleadings; took issue with the answering memorandum, calling it "patently deficient in a number of respects"; also objected that the respondent did not request an extension of time to answer as provided in Rule 5(d), or had permission been granted to the filing of a delayed answer.

By order served December 11, 1975, E.S.B.'s motion and renewal thereof for judgment on the pleadings was denied by the Presiding Administrative Law Judge, the order stating *inter alia*, "In view of the above background it is deemed most inequitable to allow judgment on the pleadings. There is an apparent unawareness by the respondent of the Commission's Rules of Practice and Procedure, that could be interpreted as a somewhat cavalier approach to this serious claim for reparations. The held up answering memorandum indicates a willingness to proceed under the Shortened Procedure. . . . The complainant would have a strict application of rules to provide for the basis of recovery of $16,489.58, and he urges that there has been no extension of time granted to the respondent to answer. While this is technically true, the circumstances as related herein obviate a formal granting of extension of time to answer since fairness, and justness cry out for the respondent to be given opportunity to promptly set forth its defense."

On December 31, 1975, a copy of the respondent's answer was received by the Presiding Administrative Law Judge from which he deduced that the respondent was in compliance with the aforementioned December 11, 1975, letter of the Secretary of the Commission for additional copies.

The respondent's answering memorandum having indicated its willingness to proceed under the shortened procedure, as requested by E.S.B., approval to so proceed was granted by order served January 7, 1976, and the record closed for decision since E.S.B. had already filed its reply thereto December 10, 1975.

MATERIALS SUPPLIED BY THE PARTIES, AND CONSIDERED BY THE PRESIDING ADMINISTRATIVE LAW JUDGE IN FINDING THE FACTS HEREIN ON WHICH TO BASE THE DECISION

The Complainant submitted:

The complaint (6 pages) to which was attached:

1. Memorandum of Facts and Arguments (5 pages)
2. Copy of Bills of Lading No. 1, 2 and 15.
3. Copy of E.S.B.'s Packing List.
   (a) Dated June 21, 1974 as to E.S.B. Order No. TN–1–1530
   (b) Dated June 28, 1974 as to E.S.B. Order No.–TN–1531–1
   (c) Dated July 25, 1974 as to E.S.B. Order No. TN–1–15312c
4. Copies of 3 Invoice—Sight Drafts, all dated September 5, 1974 as to E.S.B. orders No. TN–1–1530, TN–1–1531–1 and TN–1–1531–2c
5. Copy of 3 Letters, all dated September 11, 1975, from Shipside Packing and

Consolidating Co., Re: packing as to E.S.B. Order Nos. TN–1–1530, TN–1–1531 and TN–1–1531–2c

6. A photograph of a "Gaylord Carton"

7. A copy of the 4th Revised Page 158–A, effective September 1, 1974, of Inter-American Freight

8. Complainant's Memorandum in Reply (8 pages)

The Respondent submitted:

Answering Memorandum to complaint (so identified in November 18, 1975 letter, but memorandum itself simply bears this Docket number (75–44) and the title of the case. The Answering Memorandum consists of 4 pages, to which is attached:

1. "History" (pages 5–7)
2. Copies of Shipper's Export Declaration
3. Copies of Bills of Lading No. 1, 2 and 15
4. Copies of E.S.B.'s Packing List
   (a) Dated June 21, 1974 as to E.S.B. Order No. TN–1–1530
   (b) Dated June 28, 1974 as to E.S.B. Order No. TN–1–1531–1
   (c) Dated July 25, 1974 as to E.S.B. Order No. TN–1–1531–2c
5. Copies of 3 Invoice—Sight Drafts, all dated September 5, 1974, as to E.S.B. Orders No. TN–1–1530, TN–1–1531–1 and TN–1–1531–2c
6. Copies of claims made on behalf of E.S.B. to McCormack by Ocean Freight Consultants (OFC) dated December 23, 1974, concerning the shipments involved.
7. Copies of correspondence of respondent with OFC
8. Copy of March 5, 1975, letter from E.S.B. to OFC
9. Copy of May 1, 1975, letter from OFC to McCormack

From these materials, the Presiding Administrative Law Judge finds the following facts:

FACTS

The Complainant, E.S.B., is a Delaware Corporation located in Philadelphia, Pennsylvania whose principal business is the marketing of batteries and battery products.

The Respondent, McCormack, is a common carrier by water engaged in the transportation of cargo between U.S. Atlantic Ports and Ports of Argentine, Uraguay and Brazil, including Santos, Brazil and, as such, subject to the Shipping Act, 1916.

McCormack is a member of the Inter-American Freight Conference, and at the times involved in this proceeding operated under Inter-American Freight Conference—Section A—Tariff No. 3 (FMC No. 7).

The parties agree that Synthetic Resins were shipped from Philadelphia, Pennsylvania to Santos, Brazil, under Bills of Lading number 1, 2 and 15 respectively, all dated September 20, 1974, on the respondent's vessel *Mormacrigel*. The parties also agree that the freight rate assessed was $125.00 per 40 cubic feet as per rate item 1, 4th Revised Page 158–A (effective September 1, 1974) of Inter-American Freight Conference—Section A—Tariff No. 3, (FMC No. 7); that the charge, including a bunker surcharge of $10.00 per 40 cubic feet and a port surcharge of 8% was $7,115.04 as to B/L # 1, $7,938.81 as to B/L # 2 and $8,492.85 as to B/L # 15, a total of $23,546.76 was paid by the complainant.

Fourth Revised page 158–A of the said tariff reads, in the part under which the freight rate was assessed:

Resin, Synthetic; sheets, plates, shapes or N.O.S. . . . Rate Basis W/M / Rate $125.00 / Rate Item 1 /

EXCEPTION: Resin, Synthetic, N.O.S., In Wooden cases or fibre or metal drums or in 20 ft. or in 40 ft. House to House containers. Rule 28 to apply.

Re: Bill of Lading No. 1:

B/L #1 shows the shipment measured 1952 cubic feet.

B/L #1, under export references refers to Order No. TN–1–1531–2c. The description of Order No. TN–1–1531–2c appears on the following documents as indicated:

Document	*Description*
B/L #1	"(40) Skidded Cartons: Synthetic Resin"
Export Declaration	"(40 Skidded Cartons: Synthetic Resin"
Dock Receipt	"(40) SKIDS Ctns—Synthetic Resin" (SKIDS is in lettering above the typing of the description)
Packing List dated July 25, 1974	"40 Box, 1000 lbs. each—Amoco Polypropylene" with dimensions in inches of 47 x 39 x 46.
OFC December 23, 1974 claim	would correct from "40 Skidded Cartons" to "Synthetic Resin Polypropylene packed in cartons." "Reason for correction: Cargo subject to special rate of $94.50/2240 as the Resin shipped consisted of Polypropylene indicated in this commercial Invoice." "40 Gaylord Cartons of impact resin were packed in wooden crates 46 x 39 x 46 inches. These crates were constructed with 1 x 6
Shipside Packing Co. letter dated September 11, 1975:	yellow pine 7 inches apart with 3 x 4 inch skid each weighed 1188# gross lbs."

Re: Bill of Lading No. 2:

B/L #2 shows the shipment measured 2178 cubic feet.

B/L #2 under export references lists Order No. TN–1–1530. The description of Order No. TN–1–1530 appears on the following documents as indicated:

Document	*Description*
B/L #2	"(40) Skidded Cartons—Synthetic Resin"
Export Declaration	"40 Skidded Cartons—Synthetic Resin"
Document	*Description*
Dock Receipt dated September 9, 1974	"(40) SKIDS ctns—Synthetic Resin" (SKIDS is in lettering below the type of the description).
Packing List dated June 21, 1974:	"40 Wood Box, 1000 lbs. ea.—Amoco Polypropylene with dimensions in inches of 48 x 40 x 49.
OFC December 23, 1974, claim	would correct from "40 Skids (Pallets) Synthetic Resin" to "Resin Synthetic Polypropylene Packed in Cartons" "Reason for correction: Cargo subject to special rate of $92.50 per 2240 lbs. in Synthetic Resin consisting of polypropylene and should be rated accordingly."
Document	*Description*

Shipside Packing Co. letter, dated September 11, 1975:	"40 Gaylord cartons (sic) of impact resin were packed in wooden crates 48 x 40 x 49 inches. These crates were constructed with 1 x 6 inch yellow pine 7 inches apart with 3 x 3 x 4 inch skids each weighed 1160 gross lbs."

Re: Bill of Lading No. 15:

B/L #15 shows the shipment measured 2330 cubic feet.

B/L #15 under Export References lists Order No. TN–1–1531. The description of Order No. TN–1–1531 appears on the following documents as indicated:

B/L #15	"(40) Skidded Cartons—Synthetic Resin"
Export Declaration	"(40) Skidded Cartons—Synthetic Resins"
Dock Receipt	"(40) SKIDS Ctns—Synthetic Resin" (SKIDS is in lettering above the typing of the description)
Packing List dated June 28, 1974	"40 Pallet Box, 1000 lbs. ea. Amoco Polypropylene" with dimensions 51 x 42 x 47.
OFC December 23, 1974, claim	would correct from "40 Pallets Synthetic Resin" to "Synthetic Resin Polypropylene" "Reason for correction—Cargo subject to special rate of $92.50/2240 as it was palletized and packed in cartons."
Shipside Packing Co. letter dated September 11, 1975	"40 Gaylord cartons of impact resin were packed in wooden crates 51 x 42 x 47 inches. These crates were constructed with 1 x 6 yellow pine 7 inches apart with 3 x 4 inch skid each weighed 1222 gross lbs.

ISSUES

The complainant, admittedly, "trying to prove only that the cartons (as shown in the Bill of Lading) were enclosed in a crate/case, which packing has an applicable rate different from the rate applied" (Complainant's Memorandum in Reply p. 4), posed the question herein to be "whether the polypropylene resin packed in Gaylord Cartons which were crated and skidded is the sort of package which complies with the carrier's requirement for 'in wooden cases'." (Memo of Facts and Arguments attached to complaint, page II).

At the same time, the complainant contends that no alleged error in description is involved in this cause (Memorandum in Reply, p. 4).

The Respondent did not pose any issues. McCormack does assert the cargoes were correctly rated based on the Bill of Lading description and the packaging used. And, the Respondent mentioned Rule 3 of the tariff involved, to the effect, that claims for adjustment in Freight charges, if based on alleged error in description, weight and/or measurement, are not to be considered unless presented to the carrier in writing before the shipment involved leaves the custody of the carrier; that the shipments arrived in Santos, Brazil on October 14, 1974, and left the custody of the carrier before correction was sought and that the shipper did not write about the shipment until March 10, 1975, and that "Since March 10th, the cargoes packing has from 'Skidded Cartons' grown to alleged 'Skidded

Cartons Reinforced by Wood Crating' to alleged 'Skidded Cartons Crated' (implying Wood Crating on all sides, top and bottom) to, by synonym, 'Skidded Cases'."

The issue is, where there is no dispute the commodity shipped was Synthetic Resin which was delivered by the carrier as per the Bill of Lading, and after the shipment had left the custody of the carrier, the shipper asserts the packaging, not the description, of the commodity was otherwise than as stated in the bill of lading, the claimant, under the circumstances herein, has met its heavy ultimate burden of proof to establish his claim, to warrant finding the carrier in violation of Section 18(b)(3) of the Shipping Act, 1916, and subject to the paying of reparations to the shipper.

HOLDING

The claimant has failed to meet its heavy ultimate burden of proof that the carrier has violated the Shipping Act, 1916, and that the claimant is entitled to reparations. Reparation should be denied.

DISCUSSION

E.S.B. argues that the shipments involved consisted of polypropylene resin packed in Gaylord Cartons which were then crated and skidded (Argument P. II) for easy handling by both the shipper and the carrier (Ibid p. V).

McCormack argues the easy handling by the shipper, to avoid puncturing the "Gaylord" with fork lift equipment, would be, packing the 1000 pounds of synthetic resins into a skidded—internally reinforced—empty Gaylord container which when filled could easily be moved without fear of puncture (p. 5 answering memo); that the complainant erroneously assumes the claimed wooden reinforcement to be full external wood crating (p. 7) and that the complainant has failed to support external crating on all six sides of the carton, and has not supported beyond a reasonable doubt that external reinforcement existed (Ibid).

E.S.B. replied (Memorandum in reply, p. 6) "even if, as argued by respondent, the crating was internal (which seems incredible), the tariff requirements for 'in wooden cases' would be satisfied." E.S.B. thus pooh-poohs the idea of internal crating, but does not deny that such internal crating is possible. As to McCormack's contention that E.S.B. has not shown the cartons were crated on all six sides, E.S.B. answers that contention "is as wrong as all its (McCormack's) other arguments" (Ibid p. 7).

E.S.B. asserts the resin was packed in "Gaylord" cartons which were then crated and skidded and the tariff that should apply is also on 4th Revised Page 158(a) of the tariff at a rate of $92.50 per 2240 pounds for "Resin, Synthetic Viz: Polyethylene, Polypropylene or Polyvinylchloride, in wooden cases or fibre or metal drums or in 20 ft. or in 40 ft. House to

House containers." ("Rule 28 to apply" was omitted by E.S.B.). E.S.B. argues that the carrier does not define "wooden cases" in its tariff; that the crates were wooden is shown by the letters from the packers so that what remains is to show that a "crate" is a "case." E.S.B. then gives definitions of "case" and "crate" from Webster's Seventh New Collegiate Dictionary and from the Random House Dictionary, and argues that having shown the shipment moved crated that as a matter of law the rate for Resin, Synthetic, in wooden cases, is the only lawful rate applicable for these shipments (Argument p. V). E.S.B. argues further that under the Harter Act, 46 USCA 193, the Bill of Lading is that of the carrier, so that the carrier should not be heard to say that it did not know that the shipments moved in crates/cases.

In this instance, when the dispute arose, the cargo had left the custody of the carrier, having been delivered. Once there has been a proper delivery of cargo, the Harter Act no longer applies to the relationship of the parties. See *J. Kinderman & Sons v. Nippon Yusen Kaisha Lines,* 322 F Supp., 939, 941–942 (1971).

The Bill of Lading sets forth the contract between the shipper and the owner of the vessel, describing the merchandise by its quantity and markings, the names of the shipper and consignee, the place of departure and discharge the name of the master and vessel, and the price to be paid for transportation. Each bill of lading is a separate transaction, and the merits of each claim must be considered in toto and independent of claims under any other bill of lading. *Colgate Palmolive Co. v. The Grace Line,* Docket No. 194(I), dated March 18, 1974, pages 2–3. The burden of proving that the facts were otherwise than as stated in the bill of lading must be on the claimant in any proceeding. But where the shipment has left the custody of the carrier and the carrier is thereby prevented from personally verifying claimant's contention, the claimant has a heavy ultimate burden of proof to establish his claim. *Western Publishing Co. Inc. v. Hapag Lloyd, A.G.,* Docket No. 283(I), 13 SRR 16 (1972).

Looking at the bills of lading involved, the cargo is described on each as "(40) Skidded cartons—Synthetic Resin." E.S.B. would use the part of the *Western Publishing Co.* case, *supra,* which says "the description on the bill of lading should not be the single controlling factor in cases of this nature. Rather, the test is what claimant can now prove based on all the evidence as to what was actually shipped, even if the actual shipment differed from the bill of lading description."

An examination of the description of the cargo as shown for each bill of lading above under *Materials Supplied by the Parties* and *Facts,* shows the various descriptions of the cargo given or accepted by those representing the complainant at various stages, and tends to support the respondent's comment quoted above under *Issues,* and leaves unproved that the shipment was not properly rated.

The dock receipt, packing list, invoice, letters from packers and the documents submitted are neither contracts of affreightment nor necessar-

ily a delivery to ship, and as respects shipments in which bills of lading are issued, the "bill of lading" is as between shipowner and shipper, the statement of the contract between them. *The Capt Faure* 10 F.(2d) 950, 954, CA–2, (1926). The carrier has a right to expect the shipper will properly identify the shipment. *Ocean Freight Consultants Inc. v. Italpacific Line,* Docket No. 71–81, 15 FMC 314, 319 (1972). The shipper in this instance has not justified changing the description of the bill of lading.

FINDINGS AND CONCLUSIONS

Upon consideration of the entire record in these proceedings, the Presiding Administrative Law Judge *finds* and *concludes,* in addition to the findings and conclusions hereinbefore stated:

1. Complainant has failed to meet heavy burden of proof that respondent has violated Section 18(b)(3) of the Act.
2. Reparation should be denied.

Wherefore, it is *ordered,* subject to review by the Commission on appeal, or upon its own motion as provided in the Commission's Rules of Practice and Procedure, that

(A) E.S.B.'s claim for reparation be and hereby is denied.

(B) The proceeding be and hereby is discontinued.

(S) WILLIAM BEASLEY HARRIS,
Administrative Law Judge.

WASHINGTON, D.C.,
January 26, 1976.

FEDERAL MARITIME COMMISSION

No. 76-26

TRANSCONEX INC.—PROPOSED GENERAL RATE INCREASE IN THE VIRGIN ISLANDS DOMESTIC OFFSHORE TRADE

NOTICE OF DETERMINATION NOT TO REVIEW

January 12, 1977

Notice is hereby given that the Commission on January 12, 1977, determined not to review the order of the Administrative Law Judge in this proceeding served December 15, 1976, finding respondent's rate increase not unjust or unreasonable and discontinuing the proceeding.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 76-26

TRANSCONEX INC.—PROPOSED GENERAL RATE INCREASE IN THE VIRGIN ISLANDS DOMESTIC OFFSHORE TRADE

PRESIDING ADMINISTRATIVE LAW JUDGE ORDER (1) FINDING RATE INCREASE NOT UNJUST OR UNREASONABLE (2) DISCONTINUING PROCEEDING

December 15, 1976

Revised tariff pages[1] filed in April 1976 by Transconex, Inc. (Transconex), in its Virgin Island trade reflecting a general rate increase (this increase did not affect the rates on commodities moving in the Puerto Rico trade. Exh. 1, p. 2) of 12 percent went into effect soon after the Commission's June 3, 1976, Order (published in the *Federal Register* June 9, 1976, page 23228, Vol. 41, No. 112) lifted the suspension imposed by the Commission's Order of Investigation and Suspension herein, served May 11, 1976 (published in the *Federal Register* May 14, 1976, Page 20016, Vol. 41, No. 95). Those increased rates are still in effect, under a filing by Transconex of a new tariff FMC–F No. 2, which became effective on August 21, 1976. Although this new tariff cancels FMC–F No. 1, there is no change in rates applicable to commodities transported in the Virgin Islands trade (Exh. 1, p. 2). And, the May 11, 1976, Commission Order of Investigation and Suspension provides (p. 2): "In the event the tariff matter is further changed, amended, or reissued, such changes are hereby ordered to be included in this investigation;".

Transconex, the named respondent herein, is a non-vessel operating common carrier (NVOCC) by water in the domestic offshore trade

[1] Transconex's Ocean Freight Tariff FMC–F No. 1.

14th Revised page 15.
9th Revised page 24.
11th Revised page 25.
12th Revised page 25.
10th Revised page 26.
11th Revised page 27.
11th Revised page 37.
12th Revised page 38.
13th Revised page 38.
12th Revised page 39.
12th Revised page 40.

between Miami and Jacksonville, Florida, on the one hand, and, on the other, Puerto Rico and the Virgin Islands.

The Commission, pursuant to section 18(a) and 22 of the Shipping Act, 1916, and sections 3 and 4 of the Intercoastal Act, 1933, directed, by its May 11, 1976, Order of Investigation and Suspension, this investigation into the lawfulness of the above-mentioned revised tariff pages.

Transconex points out the rate increases are not opposed by any shipper, consignee, other person (Exh. 2, p. 2). It is the position of Transconex that the testimony on behalf of Transconex, as well as the testimony submitted by Hearing Counsel, considered by the criterion of operating ratio, as well as the criterion of rate of return on rate base show the rate increases under investigation are reasonable and should be permitted to remain in effect (Exh. 2, p. 4).

Hearing Counsel took the position (Hearing Counsel's Statement of Applicable Legal Principles and Notice of Proposed Witnesses, served July 12, 1976) that its approach in testing the reasonableness of Transconex's rate increases in this proceeding is not confined to any single standard but will be based on a number of criteria. . . . (p. 5)

Witness Thomas J. Stilling, an economist with the Commission's Bureau of Industry Economics, in his testimony (Exh. 3), points out the operating ratio is a poor measure of a company's financial well-being (p. 4) and gives little insight into the profitability of an enterprise and therefore the reasonableness of rate levels (p. 3); that when a company has invested a non-negligible amount of capital, rate of return on rate base and an owner's equity are more appropriate measures to employ when determining the fairness of rates (p. 4).

Witness Larry E. Walker, a staff accountant with the Commission's Bureau of Industry Economics, Office of Financial Analysis, reviewed the various accounting data provided by Transconex and related companies (Exh. 4, p. 1) and compared these results with rates of return being earned by other companies which are comparable in terms of risk. One industry which he found has many of the same characteristics as NVOCC's is the motor carrier industry; another industry which is similar is the domestic freight forwarding industry, which is regulated by the Interstate Commerce Commission (ICC). The witness concludes that Transconex should be in the highest rate of return bracket if it is to continue to be able to attract capital at reasonable rates. The witness showed the freight forwarding industry, regulated by the ICC, averaged a rate of return of 24.14 percent from 1965–1974, as part of his analysis. In the witness' judgment a 26.27 percent rate of return on rate base is not excessive.

Operating Ratio is costs divided by revenue. Transconex shows for the period 4/1/75 to 3/31/76 Operating Expenses of $439,425.76, and Operating Revenues of $455,995.42 for an operating ratio of 96.37%, and for the period 4/1/76 to 3/31/76 Operating Expenses of $486,969.00, and Operating Revenues of $460,512.00 for an operating ratio of 94.60%. (Ex. 1, p. 31)

DISCUSSION

The participants in this proceeding, especially their attorneys, namely Edward A. Ryan and Alan F. Wohlstetter for respondent, and Martin McAlwee, C. Douglass Miller, Acting Deputy Director, and John Robert Ewers, Director, Bureau of Hearing Counsel, deserve and hereby are commended and thanked for making cooperatively a record in this proceeding containing supporting and underlying records and accounts by which the accuracy and sufficiency of the evidence may be tested as to its probativeness, reliableness and substantialness, for findings as to the lawfulness of the instant rates under section 18 of the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933.

From the first prehearing conference held June 29, 1976, an interim meeting between the parties on July 12, 1976, the further prehearing conference held September 30, 1976, and through the hearing held November 30, 1976, all efforts were bent to going forward with the intent of presenting a case that will enable those interested to scrutinize the material which has been utilized in these proceedings. The economists and accounts cooperated well.

The respondent submitted its testimony for its case in chief on August 18, 1976, to show the lawfulness of the rate increase. Hearing Counsel and its technical staff reviewed that testimony, conferred with the respondent, and submitted the testimony of its witnesses (Exhs. 3 and 4). Transconex gave its statement of position (Exh. 2). And, in a letter dated November 22, 1976, stated, *inter alia*, ". . . Transconex will not file any rebuttal testimony in response to the direct written testimony of the witnesses of Hearing Counsel. . . ."

All of the testimony with attachments is part of this record. All of this has been closely examined by the Presiding Administrative Law Judge. It shows that the respondent has experienced increased costs of operation; that the respondent apparently operates efficiently. Some indication of need for the increases has been shown, and no computation made with respect to the increases shows them to be improper.

Upon consideration of the above and the entire record herein, the Presiding Administrative Law Judge *finds* and *concludes* the rate increase now in effect in Transconex, Inc.'s Tariff FMC–F No. 2, effective August 21, 1976 (which cancelled FMC–F No. 1) as to rates applicable to commodities in the Virgin Islands trade is not unjust or unreasonable. The increased rates withstand the test of operating ratio and rate of return on rate base. Thus, tested by several criteria, as properly they should be the rates herein are found just and reasonable.

Wherefore, it is *ordered*, subject to review by the Commission per its Rules of Practice and Procedure,

(A) The rate increases in this investigation be and hereby are found just and reasonable and shall continue in effect, until or unless otherwise changed or ordered.

(B) This proceeding be and hereby is discontinued.

(S) WILLIAM BEASLEY HARRIS,
Administrative Law Judge.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 503

SHUMAN PLASTICS INTERNATIONAL, LTD.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

February 22, 1977

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on February 22, 1977.

It is Ordered, That applicant is authorized to waive collection of $4,330.60 of the charges previously assessed Shuman Plastics International, Ltd.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 503 that effective May 1, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from May 1, 1976 through August 25, 1976, the special rate to Hong Kong on 'Synthetic Resin Product Scrap', measuring up to 80 cu. ft./2000 lbs, is $73.00 W, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 503

SHUMAN PLASTICS INTERNATIONAL, LTD.

v.

SEA-LAND SERVICE, INC.

January 26, 1977

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–28) and section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Sea-Land Service, Inc. (Sea-Land or Applicant) has applied for permission to waive collection of a portion of the freight charges on three shipments of synthetic resin scrap, that moved from New York, N.Y. to Hong Kong, P.R.C., under Sea-Land bills of lading dated June 24, 1976, July 9, 1976, and August 13, 1976. The application was initially filed on December 21, 1976, with an amendment filed on January 6, 1977. (The amendment related only to correction of an error in computation.)

The subject shipments moved via mini-bridge service under through rail-water rates published in Sea-Land Tariff No. 234, FMC No. 106 and ICC No. 92. The shipments moved via rail to Oakland, California, then via Sea-Land from Oakland to Hong Kong. Waiver of collection of the charges involved herein would affect only the ocean carrier's portion. The aggregate weight of the three shipments was 118,216 pounds, with an aggregate measurement of 4,275 cubic feet. The rate applicable at time of shipment was $138 per 2,000 pounds or 40 cubic feet, plus 40 cents per cubic foot if measuring over 70 cubic feet per 2,000 pounds (Sea-Land Freight Tariff No. 234, FMC No. 106, ICC No. 92, Item 581 2000 79, 2d revised page 352). The rate sought to be applied is $73 per 2,000 pounds

[1] This decision became the decision of the Commission on February 28, 1977.
[2] 46 U.S.C. 817, as amended.

(Sea-Land Freight Tariff No. 234, FMC No. 106, ICC No. 92, Item 581 2000 79, 3rd revised page 352).

Aggregate freight charges payable, pursuant to the rate applicable at the times of shipment, amounted to $8,542.81. Aggregate freight charges at the rate sought to be applied amount to $4,212.21. The difference sought to be waived is $4,330,60 (three shipments, total). The Applicant is not aware of any other shipments of the same commodity which moved via Sea-Land during the same time period at the rates involved in these shipments.

Sea-Land offers the following as grounds for granting the application:

(4) A special mini-landbridge rate of $73.00 per 2000 lbs. when measuring not more than 80 cu. ft. per 2000 lbs. was established from Atlantic coast terminals to Hong Kong on Synthetic Resin Scrap effective September 15, 1975 on original page 352 of Tariff No. 234, FMC No. 106. Publication was made in Item 581 2000 79 with an expiration date of January 31, 1976 that was extended to April 30 in Rule No. 10 (Attachment No. 1).

Effective May 1, 1976 a general rate increase was published in Tariff No. 234, following a comparable general increase published in the all-water rates by the Far East Conference. In preparation for it, Sea-Land's trans-Pacific pricing department in Oakland office had decided that the increase would not be applied to any of these special rates that had been established independently to meet other competitive carriers' rates. Instructions to follow were given to all concerned in teletype message dated January 23 (Attachment No. 2).

When publishing the increase, through clerical and administrative oversight extension of the expiration date beyond April 30 in circle reference E–2 in Rule 10. This error resulted in expiration of the special rate of $73.00W in Item 581 2000 79, although the rate continued to be carrier on 1st and 2nd revised pages 352 (Attachment No. 3), and subsequently the explanation of circle E–2 reference was removed from Rule 10 on 7th Revised page 86 effective July 1, 1976 (Attachment No. 4). The error in allowing the special rate to expire with April 30 left only the standard rate of $138.00W/M in that same item to apply on shipments to Hong Kong.

The shipments involved in this application were originally rated at the rate of $73.00W/M and charges paid on that basis by the complainant through his freight forwarder. Sea-Land found the mistake in the applicable tariff rate in the course of normal internal rate audit functions and issued balance due bills to the shipper.

Sea-Land did not intend to increase these special rates on May 1 and so advised the shipper by letter dated April 23, 1976 (Attachment 5). Upon receipt of the balance due bills, the shipper rejected them by letter dated November 5, 1976 (Attachment No. 6). Sea-Land pricing personnel adjusted the failure to extend the special rate by flagging it with a circle E–3 reference, expiration date of October 31, 1976, on 3rd revised page 352 effective August 25, 1976 (Attachment No. 7). Copies of the bills of lading—freight bills and a statement of the charges sought to be waived are contained in Attachment No. 8.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 6(b), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That

the common carrier . . . has, prior to applying to make a refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the failure to withhold the general rate increase from the special rates, as had been promised to the shipper.

2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate on which such waiver would be based.

4. The application was filed within one hundred and eighty days from the dates of the subject shipments.

Accordingly, permission is granted to Sea-Land Service, Inc., to waive collection of a portion of the freight charges, specifically the amount of $4,330.60. An appropriate notice will be published in Sea-Land's tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
January 26, 1977.

[3] For other provisions and requirements, see § 18(b)(3)and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-23

AGREEMENT NO. 8080-11, AMENDMENT TO THE ATLANTIC AND GULF/INDONESIA AGREEMENT; AGREEMENT NO. 8240-9, AMENDMENT TO THE ATLANTIC AND GULF/SINGAPORE, MALAYA AND THAILAND CONFERENCE AGREEMENT; AGREEMENT NO. 8080-13, AMENDMENT TO THE ATLANTIC AND GULF/INDONESIA CONFERENCE AGREEMENT

ORDER ON REVIEW

January 31, 1977

On July 12, 1975, the Atlantic and Gulf/Indonesia Conference (AG/IC) and the Atlantic and Gulf/Singapore, Malaya and Thailand Conference (AG/SMTC) each filed an amendment (Agreement No. 8080-11 and 8240-9, respectively) to their basic conference agreements. As proposed, these amendments would expand the jurisdiction of each conference to include ports, points and places on tributary inland waterways.

On July 9, 1975, another amendment (Agreement No. 8080-13) was filed with the Commission by AG/IC. As proposed this amendment would extend the jurisdiction of AG/IC to "intermodal" movements of cargo which include as a part of such movement the transportation of cargo from an Atlantic or Gulf port to Indonesia (including Timor and W. New Guinea).

Seven months prior to the filing of the conference amendments, in November 1974, Central Gulf Lines (Central Gulf) applied for membership in each conference. Central Gulf's applications were approved by each of the conferences on June 21, 1975, to become effective on July 14, 1975.

The basic conference agreements of the AG/IC and AG/SMTC require that proposed amendments to these agreements be approved by a unanimous vote of the conference members. Although it still was awaiting admission to the AG/IC and AG/SMTC at the time the conference member lines voted to amend their conference agreements Central Gulf indicated its objection to any extension of conference jurisdiction beyond ocean-port to ocean-port movements. Immediately upon becoming a member of the conferences, Central Gulf formally expressed its disagreement with each of the three proposed amendments, and requested that the conferences withdraw them from further Commission consideration.

On July 21, 1975, and August 18, 1975, Central Gulf, by then a member of AG/IC and AG/SMTC, filed protests with the Commission to the approval of the agreements. In response to the protests filed by Central Gulf, the Commission on April 21, 1976 ordered an investigation and hearing concerning the three proposed conference amendments.[1]

Administrative Law Judge Stanley M. Levy, pursuant to a motion to dismiss filed by Central Gulf, thereafter discontinued the proceeding. The Presiding Officer, relying on prior Commission determinations,[2] concluded that the subject amendments are not "agreements," within the meaning of section 15 of the Shipping Act, 1916, because, prior to their approval by the Commission, a member of the conferences, *i.e.* Central Gulf, had indicated that it did not assent to the amendments, thereby destroying the required unanimity. Having so determined that there were no agreements before the Commission to approve, he discontinued the proceeding. No exceptions to the Presiding Officer's ruling were filed. The Commission subsequently determined to review the Presiding Officer's Order discontinuing this proceeding.

We find that the Presiding Officer misinterpreted the *Hong Kong Tonnage Ceiling* decision and its progeny and erred in finding that Central Gulf's admission to the conference vitiated the required unanimity. In *Hong Kong Tonnage Ceiling* the Commission considered the impact of the withdrawal of one of the *original* signatories from the agreement prior to Commission approval. The factual situation in *Hong Kong Tonnage Ceiling* though somewhat similar is clearly distinguishable from the factual situation obtaining in the instant proceeding.

The circumstances here are more akin to those surrounding the agreement put at issue in Docket No. 72–46—*Agreement No. 57–96—Pacific Westbound Conference Extension of Authority for Intermodal Services*, served July 2, 1975.[3] There, Seatrain International, S.A. (Seatrain) had applied for membership in the Pacific Westbound Conference, which has a unanimity requirement for amendments to the conference agreement. Prior to the admission of Seatrain, the conference adopted and filed an amendment, designated Agreement No. 57–96, with the Commission for approval. Seatrain protested the agreement and opposed its approval. In approving the agreement the Commission did not specifically address the impact of Seatrain's dissent on the conference unanimity provision. However, by approving the agreement the Commission determined, albeit by implication, that the entry of a new conference member does not invalidate a prior unanimous conference action, even though that action has not yet received Commission approval.

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[1] By letter, dated June 29, 1976, counsel for AG/SMTC advised the Commission that Agreement No. 8240–9 was withdrawn and that "Such agreement need not therefore be considered further under the pending Commission proceeding Docket No. 76–23."

[2] *Hong Kong Tonnage Ceiling Agreement*, 10 F.M.C. 134 (1966); *New York Freight Bureau (Hong Kong)*, 10 F.M.C. 165 (1966); *Inter-American Freight Conference—Cargo Pooling Agreements*, 14 F.M.C. 58 (1970); *Agreement No. T–2336—NYSA*, 11 S.R.R. 432, 435, n. 6 (1970); and *Agreement No. 2423—Port of Seattle*, 12 S.R.R. 91 (I.D.), *aff'd*, 12 S.R.R. 221 (FMC, 1971).

[3] The final order in this proceeding was served on September 20, 1976.

Thus, there is a critical difference between the pertinent facts of *Agreement No. 57-96* and the present proceeding on the one hand and *Hong Kong Tonnage Ceiling* on the other. In the latter proceeding (*Hong Kong*), withdrawal of an *original* party prior to Commission approval vitiated the agreement. In the former proceeding (*Agreement No. 57-96*), the entry of a new conference member did not abrogate the previously unanimous conference filing. That result is clearly controlling here. Accordingly, we find that the Presiding Officer erred in ruling that no agreement existed on which he and the Commission could act.

While we disagree with the Presiding Officer's reasons for discontinuing the proceeding, we nevertheless concur in such discontinuance, albeit on other grounds. As previously noted no party to this proceeding including AG/IC, the proponent of the agreements, filed exceptions to the Presiding Officer's ruling that there was no valid agreement before the Commission. We consider this failure to except to the Presiding Officer's ruling tantamount to acquiescence in that decision and construe it as an effective withdrawal of these agreements from the Commission's consideration.[4]

THEREFORE, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

[4] See, *Seaboard and Western Air Mail Authorization*, 29 CAB 49 (1959), where the Civil Aeronautics Board held that the failure of a party to except to an examiners decision is tantamount to acquiescence in that decision.

FEDERAL MARITIME COMMISSION

DOCKET NOS. 75-4 AND 75-5

DEPARTMENT OF DEFENSE AND MILITARY SEALIFT COMMAND

v.

MATSON NAVIGATION COMPANY

ORDER ON APPEAL OF DISMISSAL

February 2, 1977

This consolidated proceeding[1] is before the Commission on an appeal taken by the Military Sealift Command (MSC), from a ruling of Administrative Law Judge William Beasley Harris dismissing complaints filed by the Department of Defense and MSC.[2] A previous dismissal of the same complaints by the Presiding Officer was remanded by us on appeal on the grounds that the Presiding Officer had failed to set forth any reasons or basis for his conclusion that the Complainants had failed to make out a case on the facts and the law as required by the Administrative Procedure Act and the Commission's Rules of Practice and Procedure.[3]

On remand, the Presiding Officer in a Supplemental Order of Dismissal again found that the Complainants had not supported their allegation that Matson's failure and refusal to file appropriate military class rates is an unjust and unreasonable practice under section 18(a) of the Shipping Act, 1916 and section 4 of the Intercoastal Shipping Act of 1933. According to the Presiding Officer, ". . . the evidence presented by [Complainants] bears little relevance to their allegations and burden of proof," and ". . . no violation of the Shipping Act has occurred as a result of Respondent's failure to continue the past practices of simplified rates for military cargo."

MSC has appealed the dismissal. Matson Navigation Company (Matson), Hearing Counsel, and the Household Goods Forwarders Association of America, Inc. (HHGFAA), have responded in support of the dismissal.

MSC raises four principal objections to the Presiding Officer's ruling.

[1] Docket No. 75-4 involves Matson's rates between the West Coast of the United States and Hawaii, and Docket No. 75-5 deals with Matson's rates between the West Coast and Guam.

[2] Hereinafter, all references will be to MSC since it is the entity which is actively litigating the case.

[3] Order on Appeal from Presiding Officer's Dismissal of Complaint, April 9, 1976.

First, it is alleged that the Presiding Officer failed to comply with the Commission's Order on Remand in that his Supplemental Order fails to make findings and conclusions as well as state reasons or basis therefore upon all material issues of fact, law, or discretion presented on the record.

Second, MSC contends that the Presiding Officer erred in dismissing the complaints because of noncompliance with Department of Defense regulations requiring that the furnishing of the full noun-nomenclature of items shipped by MSC with Matson. MSC alleges that the Presiding Officer apparently concluded that MSC's noncompliance with DOD regulations was willful and therefore, MSC was undeserving of what the Presiding Officer termed, "equitable relief." MSC notes that the evidence in the record indicates that compliance with DOD regulations is not an easy matter but explains that it has attempted to conform to those regulations.

Third, MSC argues that the Presiding Officer erred in holding that the Commission has no authority to require Matson to continue the class rate structure formerly in effect. According to MSC, the case cited by the Presiding Officer in support of his statement is inapplicable to the issues in the current proceeding.

Finally, MSC contends that the Presiding Officer erred in his endorsement and adoption of the reasoning of Matson and Intervenors to the extent that that reasoning is erroneous. MSC argues that the Presiding Officer's endorsement and adoption of these positions is insufficient to satisfy section 8 of the Administrative Procedure Act or Rule 13(e) of the Commission's Rules. In responding to the various arguments raised on brief, MSC incorporates its previous reply brief which addresses the arguments and positions raised by Matson and Intervenors in their earlier Motions to Dismiss.[4]

Matson, in its response to MSC's exceptions, is of the opinion that the Presiding Officer's Supplemental Order does contain adequate findings, conclusions, and reasoning and should be affirmed by the Commission. Matson argues that MSC offered no evidence that it is currently paying excessive freight charges by reason of its inability to identify cargoes. The evidence introduced allegedly indicates that MSC's cargoes were properly and adequately identified and the lowest applicable rate under Matson's tariff applied; that no effort was made by MSC to quantify the expense that might be involved in changing existing documentation procedures; and, further, that MSC has failed to offer any proof as to whether it is currently paying a greater or lesser amount than the "fully allocated costs plus a reasonable system average return" level of rates which MSC now asks the Commission to prescribe for it.

Finally, Matson believes that the proposed class rates which MSC

[4] For a fuller discussion of the arguments and positions raised by the parties for and against the Motions to Dismiss see our Order of April 9, 1976, which summarizes these arguments.

would like to see established would violate sections 18(a) and 16, First of the Shipping Act, 1916. These "class rates" would allegedly create a classic example of unjust discrimination in which the sole justification for the discrimination rests not in transportation conditions but rather on the identity of the shipper.

Hearing Counsel also urge the Commission to uphold dismissal of the complaints. In so doing, they rely on the arguments advanced in their Motion to Dismiss of October 30, 1975, wherein they contended that the repeal of section 6 of the Intercoastal Shipping Act of 1933 precluded the type of rate structure requested by MSC; that MSC's difficulties in rating military cargoes in accordance with commercial tariffs were the result of its own failure to administer the MILSTAMP (Military Standard Transportation Movement Procedures) system to the extent of its capabilities and its obligations; and that there has been a failure of proof on the issue of the proper level of rates assessed MSC by Matson.

HHGFAA advised by letter that while it would not submit a separate pleading in response to MSC's appeal it also would rely on its earlier Motion to Dismiss in support of the Presiding Officer's ruling and in opposition to the appeal of MSC. In this regard, the comments of HHGFAA generally followed those presented by Hearing Counsel.

We have reviewed the Supplemental Order of Dismissal of the Presiding Officer and find that it substantially complies with the requirements of the Administrative Procedures Act and our own Rules of Practice and Procedure.

The Presiding Officer's Order makes clear his findings and provides an adequate explanation for the ultimate conclusion reached, *i.e.*, that the Complainants have failed to meet their burden of proof and that no violation of the Shipping Act has occurred as a result of Matson's failure to file class rates for military cargo. We find that the Presiding Officer's Order is procedurally sufficient and agree with his ultimate disposition of this matter.

In its appeal MSC argues that:

> A mere endorsement and adoption of the reasoning in the initial Order of Dismissal which the Commission found deficient can hardly in itself contain a cure for that deficiency.

MSC apparently misconstrues our remand. We took no position with respect to the merits of the arguments advanced by any of the parties in the initial Order of Dismissal. Our concern was with the failure of the Presiding Officer to adequately explain the basis for his conclusions. We believe that he has rectified that deficiency in his Supplemental Order of Dismissal.

MSC excepts to the Presiding Officer's reliance on Complainant's noncompliance with DOD regulations requiring that the military furnish the full noun-nomenclature of items shipped as a ground for the dismissal of its complaint. It is true that the Presiding Officer did place significant

emphasis on MSC's failure to o conform to MILSTAMP which essentially requires that there must be a complete description of the cargo so that a proper determination can be made as to which commercial tariff to apply. The Presiding Officer found that:

> [S]uch noncompliance undoubtedly relates directly to the controversy immediately involved in this proceeding and is of such a character as renders the Complainants interest undeserving of the protection or equitable relief sought. Equity requires that he who invokes its aid in any transaction must be ready to perform in reference to that transaction whatever justice may demand.

This finding appears to reflect a belief that MSC is attempting to obtain a rate structure which would free it from having to comply with its own regulations. In this regard, MSC's problems in complying with MILSTAMP do not, in and of themselves, provide a proper basis for finding Matson's present rate structure unreasonable in violation of section 18.

We do not share MSC's concern over the Presiding Officer's consideration of *Scott Paper Co. v. Puerto Rico Maritime Shipping Authority*, Docket No. 74–43, 14 SRR 1616 (1975), and its possible impact on this proceeding. Our disposition of the appeal now before us can be made without recourse to the possible application of *Scott Paper* to this proceeding.

In its appeal, MSC cites a number of substantial issues of law or of mixed law and fact which they believe must be resolved before a decision on the motions can be reached. Certain of these issues are present in another proceeding, Docket No. 75–20, *Puerto Rico Maritime Shipping Authority Rates on Government Cargo,* now pending initial decision, and we see no reason to address those issues in this proceeding. However, we do believe that to properly dispose of the matter before us the first legal issue raised by MSC should be resolved. As framed by MSC, this issue reads as follows:

> Does the repeal of section 6 of the Intercoastal Shipping Act of 1933 preclude as a matter of law a separate simplified rate system like that requested to be established in our complaints and in substance like that used by MSC with Matson and other common carriers before that repeal?

Much has been said about the Congressional intent in repealing section 6 of the Intercoastal Shipping Act, 1933. MSC argues that the condition intended to be corrected by the repeal of that section was not the *nature* of government rates but the *level* of such rates. Thus, MSC contends that provided the level of rates for the carriage of military cargo was fair and reasonable vis-a-vis commercial cargo a different class of rates for military cargo could be established. For the most part, the other parties in the proceeding appear to take the position that MSC is not entitled to any preference whatsoever and rates on military cargo must take the same form as commercial rates.

We believe that to a certain extent both positions are correct. Congress was concerned that the rates on commercial cargoes were subsidizing the

carriage of government cargoes.[5] To rectify this problem, Congresss repealed section 6 and amended section 5 of the Intercoastal Shipping Act, 1933 so as to provide for the economic regulation of rates on government cargo. These rates must now meet the same statutory standards of reasonableness and fairness as presently apply to rates charged for the transportation of commercial cargo in the applicable trades.

What Congress has done is to require that rates for the carriage of government cargoes be established on the same basis as commercial rates. In other words, the government is no longer statutorily entitled to reduced rates but must justify such rates on valid transportation factors. This was recognized in the Senate hearings on P.L. 93–487 in the following exchange between Senator Inouye and FMC Commissioner James V. Day:

> Senator Inouye: If Section 6 were repealed, wouldn't the federal government still be eligible to obtain special rates based on demonstrable savings from the transport of government cargo, such as volume, lack of advertising, etc.?
>
> Answer: Commissioner Day: That is a correct statement, Mr. Chairman. As I pointed out, removal of Section 6 from the Intercoastal Act would not preclude the obtaining of lower rates by anyone—the government, states and local jurisdictions, or charities. In fact those shippers mentioned in Section 6 may find that when Section 6 is repealed the carrier's compensable transportation costs will be such that the true considerations—service, transit time, time of tender, etc.—and *not* the outdated, artificial foundation of Section 6, result in lower rates.

Senate Report No. 93–1278 also supports this position. It states in part:

> Deletion of section 6 need not mean that the government and commercial rates will be the same. In instances where the government can show that there are cost savings in the carriage of government cargo, it will be entitled to obtain lower rates.

The fatal flaw in Complainant's case is that they have failed to establish valid demonstrable savings to the carrier from the transport of government cargo. MSC, as any other shipper, could justify a particular rate if based on proper transportation factors. However, the evidence in this record does not support the establishment of MSC's class rates. We do not consider MSC's principal concern, *i.e.*, the difficulty of rating military cargoes in accordance with commercial tariffs, as sufficient to justify the lower class rates. MSC's proof goes primarily to this alleged difficulty.

Therefore, we conclude that while the repeal of section 6 of the Intercoastal Shipping Act, 1933 does not preclude as a matter of law a separate simplified rate system, such a rate structure must be based on valid transportation factors. The record in this proceeding does not establish the necessary factors.

It follows, therefore, that MSC's allegations of section 18(a) violations

[5] The legislative history of P.L. 93–487 which repealed section 6 is found in the published *Hearings Before the Subcommittee on Merchant Marine of the Committee on Merchant Marine and Fisheries, House of Representatives, 93rd Congress, Second Session, on Rate Exemptions*, H.R. 13501 and H.R. 13615, July 10, 1974, Serial No. 93–47, pp. 1–55; *Hearings Before the Subcommittee on Merchant Marine of the Committee on Commerce, United States Senate, 93rd Congress, Second Session, on S. 3173*, August 9, 1974, Serial No. 93–101, House Report No. 93–1348 of September 11, 1974 and Senate Report No. 93–1278 of October 11, 1974.

on the part of Matson because of its refusal to file "appropriate military class rates" are unsupported in this record. MSC has failed to establish that Matson's present rate structure is unreasonable as applied to MSC vis-a-vis other shippers. Similarly, MSC's request that container rates for military cargo be established at a level that will provide Matson "a return equivalent to the fully allocated costs of transporting those classes of cargo plus an appropriate return on its investment in the trade" would, to the extent that such a standard is not applied to commercial shipments, put MSC in a preferred class. This would establish a special class of rates applicable only to military cargoes and, without additional justification, would clearly be contrary to the intent of Congress in repealing section 6 of the Intercoastal Shipping Act of 1933.

THEREFORE, IT IS ORDERED, That MSC's appeal of the Presiding Officer's ruling on dismissal is denied and the proceedings in Docket Nos. 75–4 and 75–5 are hereby dismissed.[6]

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

[6] The various motions to dismiss now before us were made at the conclusion of MSC's case in Docket 75–4 and Docket No. 75–5 except for the receipt of certain expert evidence concerning the level of class rates requested under Docket No. 75–5 which was postponed by agreement and consent. Such evidence is now irrelevant, however, in view of our finding that the record does not support the establishment of any class rates.

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

Subchapter A—General Provisions

[GENERAL ORDER 16 AMDT *16*, DOCKET NO. 76-49]

Part 502—Rules of Practice and Procedure

February 4, 1977

Miscellaneous Amendments

This proceeding was instituted by notice of proposed rulemaking published in the Federal Register of September 20, 1976 (41 F.R. 40504). The purpose of the proceeding was to amend appropriate sections of the Commission's rules of practice to (1) specify that, in proceedings under section 15 of the Shipping Act, 1916, parties to the agreement shall be designated "proponents" and parties opposing approval shall be designated "protestants"; (2) place in the presiding officer the authority to rule on production of witnesses and materials located in a foreign country; and (3) establish a procedure for Commission review of orders of dismissal by presiding officers which have not been appealed.*

Comments were submitted by the Council of European and Japanese National Shipowners' Association (CENSA); Japan/Korea Atlantic and Gulf Freight Conference, Trans-Pacific Freight Conference of Japan/Korea, New York Freight Bureau, and Trans-Pacific Freight Conference (Hong Kong) (Conferences); Maritime Administrative Bar Association (MABA); and the Commission's Bureau of Hearing Counsel (Hearing Counsel). We have considered these comments carefully and herewith publish final rules. A section-by-section analysis of the rules and comments thereon follows.

1. Section 502.41 was proposed to be amended by designating parties to agreements as "proponents" and parties opposing approval as "protestants" in proceedings relating solely to approvability of section 15 agreements. The proposal is designed to eliminate the current and misleading designations of "respondents" and "petitioners."

*For a fuller explanation of the purpose of the proposed amendments, see notice of proposed rulemaking cited above.

No comment was made to this proposal and it will be incorporated in the final rule.

2. Sections 502.210 and 502.136 were proposed to be amended and section 502.211 deleted to the net effect that presiding officers would rule on the production of witnesses and materials located in a foreign country. It was believed that the proposed procedure would eliminate confusion and delay occasioned by the present system of dual jurisdiction, i.e., authority in the presiding officer to compel production of witnesses and materials located in the United States and in the Commission with respect to a foreign country.

CENSA objects to the proposals on the ground that the Commission alone should deal with matters which might arise from attempts to obtain documents or subpoena persons abroad. It points out that the current standards for quashing subpoenas might not encompass, for example, prohibitory statutes of other nations. If the Commission adopts the proposals, CENSA urges that procedural guarantees be incorporated, i.e., the presiding officer be required to consider the effect on international relations in making any ruling and that parties have an absolute right to appeal any such ruling.

The Conferences generally echo CENSA's position as to the Commission's traditional role in matters of international import. They assert also that the efficiency to be gained under the proposal is illusory in that the Commission would ultimately have to enforce any order of the presiding officer. They also urge the right of immediate appeal.

MABA takes no position on the question of whether presiding officers should have the proposed authority since its members are divided on this question. MABA, however, questions the authority of the Commission to limit the time within which a private party may bring an enforcement action.

Hearing Counsel support the proposal generally but would revise the wording of section 502.210(d) to make clear that *only* the Commission shall enforce orders and that enforcement is discretionary.

The matter of enforcing orders abroad is not a common one but when it occurs it is a matter of concern. The process is very delicate, perhaps involving other entities of the government, e.g., Department of State. The Commission should be the entity making such determinations based on policy as well as legal considerations. Accordingly, we shall not adopt this aspect of the proposal.

We believe, however, that the presiding officer should at least be able to determine whether the problem is one for him or the Commission. Accordingly, we are amending section 502.210(a) to require an answering party to indicate whether or not witnesses or documents are located in a foreign country. Section 502.136 will be amended in accordance with all the foregoing.

3. Section 502.227 was proposed to be amended by providing specifi-

cally for review of orders of dismissal by presiding officers. At present, the rules are silent as to this.

MABA is of the opinion that the present rules permit review of dismissals by the Commision but supports the proposal as stating the Commission's authority explicitly.

Hearing Counsel would add language to insure that service of a notice to review would not constitute a reopening of the record.

At the time of fashioning its proposal, the Commission was attempting to do what MABA suggests, i.e., clarify the rules. As to Hearing Counsel's addition, we feel it unnecessary. A record can not be reopened automatically; only the presiding officer or Commission, as appropriate, may do so.

Therefore, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553) and sections 27 and 43 of the Shipping Act, 1916 (46 U.S.C. 826, 841a), Part 502 of Title 46, Code of Federal Regulations is amended.*

Effective Date. Inasmuch as the expeditious adoption of these rules is desirable and inasmuch as they are procedural in nature, they shall be effective upon publication in the *Federal Register* and shall be applicable to all pending and future proceedings.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

*The text of the amendment is reprinted in 46 C.F.R. 502.41, 502.210(a), 502.136, 502.227.

FEDERAL MARITIME COMMISSION

DOCKET NO. 73-66

AUSTASIA CONTAINER EXPRESS, A DIVISION OF AUSTASIA INTERMODAL LINES, LTD.—POSSIBLE VIOLATIONS OF SECTION 18(b)(1) AND GENERAL ORDER 13

Respondent found to be a nonvessel operating common carrier in the foreign commerce of the United States within the meaning of section 1, Shipping Act, 1916, even though the water portion of the through transportation offered commenced at a Canadian port.

Respondent ordered to file a tariff pursuant to section 18(b)(1), Shipping Act, 1916, and General Order 13 of the Commission's Rules; section 1 carriers are subject to through route tariff filing requirements regardless of whether they make a vessel call at an United States port.

Charles F. Warren and *George A. Quadrino* for respondent.

Stanley O. Sher and *Jacob P. Billig* for intervenor U.S. Atlantic & Gulf/Australia-New Zealand Conference.

Patricia E. Byrne and *Donald J. Brunner,* Hearing Counsel.

REPORT AND ORDER

February 7, 1977

BY THE COMMISSION: Karl E. Bakke, *Chairman;* Ashton C. Barrett, Bob Casey, James V. Day, *Commissioners.*

This proceeding was instituted to determine whether Austasia Container Express (ACE), an unincorporated division of Austasia Intermodal Lines, Ltd., is a common carrier by water in the foreign commerce of the United States within the meaning of section 1 of the Shipping Act, 1916 (Act), and section 510.21(d) of the Commission's Rules (Rules),[1] and, if so, why ACE should not be found in violation of section 18(b)(1) of the Act or section 536.16 of the Rules for operating without filing a Federal Maritime Commission tariff.[2] The U.S. Atlantic and Gulf/Australia-New Zealand

[1] Section 510.21(d) of the Rules defines "nonvessel operating common carrier." Copies of the pertinent regulations and statutes are appended hereto.

[2] Section 536.16 concerns the filing of through rates and through routes. It was adopted in 1970 as Amendment 4 to General Order 13 (35 F.R. 6397).

Conference (Conference), a group of vessel operating common carriers in the U.S./Australia trade making direct calls at U.S. ports, intervened.[3]

BACKGROUND INFORMATION

ACE, since June 1972, through direct contact, mail, and newspaper advertising, and shipping agents located in Detroit, Chicago and New York, has held itself out to U.S. freight forwarders and shippers as offering a through common carrier service from Detroit, ACE's principal place of business, to various Australian ports.[4] The service is conducted in the following way:

(1) Shippers deliver their cargo to a freight consolidator contracted for by ACE and located within the Detroit Commercial Zone (presently in Romulus, Michigan). There it is assembled into carload lots in containers leased to ACE;

(2) Under a contract with ACE to move the goods from Detroit to Vancouver, British Columbia, the Canadian Pacific Railway (CPR) subcontracts with a truck line to carry carload lots from the consolidator in Detroit, to Windsor, Ontario;[5]

(3) From Windsor, the cargo moves by rail to container yards in Vancouver;

(4) ACE contracts with various steamship lines calling at Vancouver for the ocean carriage of the containers. These lines do not sail directly to Australia, but proceed to Japan where the containers are transshipped to other vessels calling directly at Australian ports;

(5) Containers are delivered at the Australian ports of Sydney and Melbourne. ACE also holds itself out to carry cargo to Adelaide and Brisbane, which it accomplishes by arranging for overland transportation from Sydney or Melbourne.[6]

ACE issues a single bill of lading for this entire movement when the cargo reaches Canada.[7] This bill indicates Windsor as the "Port of Loading" and Detroit as the "pier."[8] Clause 7 indicates that the carrier's responsibility begins at the "port of loading," but ACE claims responsibility for the goods from the moment they are received by its consolidator in Detroit.[9]

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[3] The Pacific-Australasian Tariff Bureau was also granted leave to intervene, but did not participate in any phase of the proceeding.

[4] ACE's advertisements create the impression that ACE is holding itself out as a steamship line and ACE testified that this was its intention. Most of its shipper clients are located in midwestern states.

[5] Windsor is directly across the Detroit River from Detroit. In the past CPR also subcontracted with a ferry operator to move ACE cargo to Windsor, but no longer does so.

[6] ACE reserves the unqualified right to deviate from the above route (Bill of Lading Clause 6; Tariff Rule 19), but has yet to exercise that right.

[7] An onboard bill of lading is generally issued by ACE's agent in Canada after it receives TELEX confirmation that the goods have actually been loaded in Vancouver. *Unless a special request is made, a shipper will only have the Detroit consolidation yard receipt to evidence transfer of possession of his cargo until the onboard bill is issued.*

[8] Windsor is placed on the bill to make it clear that the cargo is routed through Canada. Canadian cargo receives reduced customs duty in Australia, and this is one reason that ACE can ordinarily offer its service at a lower cost then the cost for routing the same cargo through Los Angeles or New York.

[9] The source of this Detroit to Windsor liability was not indicated, but is presumably grounded in common law principles. ACE's advertising infers a unitary bill of lading from *Detroit* to Australia and the single freight rate on the bill of lading covers the entire movement from Detroit to Australia.

ACE has no tariff on file for this service. In 1972, ACE prepared a tariff, but was informally advised by the Commission's staff that filing was unnecessary. This 1972 tariff is still the basis for ACE's rates; various surcharges and other assessments are added to the 1972 quotations to arrive at the present charges. Only ACE knows how its rates are determined. A shipper usually discovers a rate by requesting such information from his forwarder or agent who in turn asks ACE. The record does not reveal whether ACE's tariff is available for public inspection.

American Container Express, Inc., a corporation owned and controlled by the same individual who controls Austasia Intermodal Lines, Inc., possesses ICC Part IV freight forwarder authority to carry containerized export cargo (general commodities) from all points in Michigan and Ohio to Michigan "ports of entry."[10] This Part IV operation also employs the ACE trade name and presumably has assumed all United States functions of Austasia Intermodal Lines, Inc.[11] Despite the fact that two bills of lading are required, ACE apparently offers an effective "door-to-door service" from U.S. inland points to Australia.

Through the end of 1974, ACE carried about 8,000 revenue tons of export cargo, served 40–50 United States shippers and issued 900–1000 bills of lading. ACE stipulated that it competes with the all water service offered by the Conference.

Administrative Law Judge Norman D. Kline (Presiding Officer) issued an Initial Decision holding that ACE is not a common carrier by water subject to the Commission's jurisdiction. This decision relies primarily on the legislative history of Shipping Act section 1. When the Alexander Committee examined the steamship industry in 1913, all water, port-to-port transportation was the only significant type of ocean carriage available. This fact, plus certain testimony relating to the final legislation adopted in 1916, led the Presiding Officer to conclude that the Act's provisions are limited to water carriers *physically serving* U.S. ports.[12]

Several court and Commission decisions are also quoted in support of this result.[13] The second Circuit's language in *Compagnie Generale Transatlantique*, *supra*, is typical:

> A steamship company engaged in foreign commerce, *with ships entering the United States' ports* in such commerce, is within the obligation of the Shipping Act, and the fact that the bill of lading was issued in France does not exclude it. (Emphasis added.)

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[10] The ICC application (FF–453) of American Container Express, Inc., was granted January 16, 1976, subsequent to the release of the Initial Decision herein. This authority is restricted to export traffic having a subsequent movement *by water*.

[11] Mr. Glenn W. Scherenbach, President of Austasia Container Express, testified that Austasia Intermodal Lines, Inc., would cease operations in the United States once American Container Express, Inc., received its Part IV certificate.

[12] *E.g.*, House Committee on the Merchant Marine and Fisheries, *Hearings on H.R. 14337*, 64th Cong., 1st Sess. (1916). Statements of Representative Hadley, at 32–33; statements of Isider Jacobs (President, California Canneries Co.), at 55–57; and statements of maritime lawyer J. Parker Kirlin, at 128.

[13] *Compagnie Generale Transatlantique, Inc. v. American Tobacco Co.*, 31 F.2d 663, 665 (2d Cir. 1929); *Armement Deppe, S.A. v. United States*, 399 F.2d 794, 797 (5th Cir. 1968); *Pacific Seafarers, Inc. v. A.G.A.F.B.O., et al.*, 8 F.M.C. 461, 465 (1965).

The Presiding Officer further noted that, although the Commission has extended its tariff filing requirements over through routes going beyond port areas[14] and over connecting carriers not themselves calling at U.S. ports,[15] in both instances at least one participating carrier in the through movement made an actual vessel call at a U.S. port.

The Initial Decision also held that Shipping Act section 18(b)(1) was inapplicable to ACE's activities because the words "to and from United States ports and foreign ports" modify the "through route" language of that section and thereby limit its application to water carriers which *physically call* at U.S. ports. This result was supported by the finding that section 18(b)(1) is patterned after Shipping Act section 18(a) and section 2 of the Intercoastal Shipping Act, 1933,[16] and the Commission has described its "through route" jurisdiction under section 2 as applying *only* to arrangements between intercoastal water carriers.[17]

Finally, the Presiding Officer concluded that the jurisdictional underpinning of the Commission's through route and through rate regulations (section 536.16) was exclusively limited to section 18(b)(1). Given his interpretation of section 18(b)(1), it followed that through route/through rate tariffs need be filed only when they include an ocean rate offered by a carrier *physically serving* a U.S. port.

Exceptions to the Initial Decision were filed by the Conference and by Hearing Counsel. ACE filed a Reply to Exceptions. These pleadings largely repeat the arguments presented to the Presiding Officer and address three basic questions: (1) Does section 1 of the Act embrace ACE's service? (2) Must ACE file a tariff under section 18(b)(1) of the Act? (3) Must ACE file a tariff under section 536.16 of the Rules? Hearing Counsel supports the Conference, but argues that ACE's operations are subject to section 1 and this alone determines the tariff filing issue.

POSITION OF THE CONFERENCE

The Conference first states that Ace is a common carrier in foreign commerce because of its undertaking with respect to the public: it widely solicits cargo for and actually undertakes through transportation from the United States to Australia; issues bills of lading in its own name; assumes liability for the entire movement; and charges shippers a single dollar amount therefor.

The Conference argues that while the legislative history of the 1916 Act

[14] 46 C.F.R. 536.16.

[15] *Transshipment Agreement Indonesia/United States*, 10 F.M.C. 183 (1966); *Transshipment Agreement Between S. Thailand and United States*, 10 F.M.C. 199 (1966).

[16] Section 2 states, in pertinent part, that:

> . . . if a through route is established, [a carrier must file] all the rates . . . in connection with transportation between . . . points in its own route and . . . on the route of any other carrier *by water*. (Emphasis added.)

[17] *E.g., Sea-Land Service, Inc.—Cancellation of Rates*, 11 F.M.C. 137, 142, and n. 6 (1967) which concerned the Commission's 1960 rejection of a single-factor joint motor-water tariff between Utah and Hawaii because "it was impossible to determine . . . where FMC or ICC jurisdiction began and ended." See also *Gulf Intercoastal Rates to and From San Diego* (No. 2), 1 U.S.S.B.B. 600, 605 (1936); *Intercoastal Investigation, 1935*, 1 U.S.S.B.B. 400, 457 (1935).

may reflect only those shipping problems Congress recognized at that time, this alone does not show a legislative intent to foreclose the Act's application to future technological changes. The Committee testimony cited by the Presiding Officer cannot support a restrictive interpretation of section 1. At best it shows that certain opinions were brought before the Congress. Similarly, the judicial decisions relied on by the Presiding Officer merely indicate that in 1916 shipping lines in fact operated to and from U.S. ports. These cases do not even address the question of whether foreign commerce carriers not physically calling at United States ports are immune from Shipping Act regulations.

The Conference contends that the status of ACE's service must be decided by considering the remedial purposes of section 1 and the breadth of the language employed, and then construing the statute liberally to achieve that purpose. *Activities, Tariff Filing Practices and Carrier Status of Containerships, Inc.*, 9 F.M.C. 56, 59 (1965). Important regulatory objectives will be frustrated if ACE is held to be outside the Commission's jurisdiction: Ace will continue quoting rates which cannot be verified; shippers will remain unsure whether the same rates or services that are available to them are also available to their competitors; and shippers and ports will have no forum to voice complaints of discrimination or prejudice.

The Conference further claims that if section 1 is not limited to water carriers touching U.S. ports then, *a fortiori*, section 18(b)(1) is not so limited. It states that the words "transportation to and from United States ports and foreign ports" do not themselves evince a Congressional intent that the water carrier must call at a U.S. port, and were not meant to preclude the filing of tariffs by services such as ACE. Moreover, the Conference believes the "to and from U.S. ports" language does not modify the subsequent words "and all through routes which have been established," so that rates for through transportation must be filed even if the through route does not feature a vessel call at a U.S. port.

The Presiding Officer's analogy between section 18(b)(1) and section 2 of the Intercoastal Shipping Act, 1933, is also disputed by the Conference. The fact that the sections are similarly worded does not mean their purpose and intent are the same. In this instance, the analogized statutes are said to cover vastly different trades and have vastly different breadth and purpose. The Presiding Officer's reliance on language from the *Transshipment Agreement* cases, *supra*, is challenged because those cases were not directly concerned with tariff filing pursuant to section 18(b)(1).

Finally, the Conference argues that section 536.16 embraces ACE's service since General Order 13 requires all section 1 common carriers to file rates governing through transportation between ports or points in the United States and ports or points in a foreign country. If Detroit is not a "port," it is at least a "point" for purposes of section 536.16.

POSITION OF ACE

ACE supports the Initial Decision in all respects, primarily contending that: the language of section 1 itself *connotes* port-to-port service; legislative history demonstrates that section 1 requires actual United States port calls for carriers in both domestic and foreign commerce;[18] Detroit is not a "port" in this instance because it is not being directly served by any type of water transportation; the doctrine of liberal construction to effectuate a remedial design cannot establish Commission jurisdiction where all other critical elements are lacking; the "through route" portion of section 18(b)(1) is inapplicable to through routes not involving U.S. ports because the "to and from U.S. ports and foreign ports" phrase of 18(b)(1) applies to, and modifies, the "own route" *and* the "any through route" tariff filing requirements; the "through route" language of section 18(b)(1) was intended to cover only through arrangements *among water carriers*, as was section 2 of the Intercoastal Shipping Act; and, section 536.16 is inapplicable to its NVOCC service because the Commission lacks jurisdiction over the inland portion of the intermodal movements.[19]

DISCUSSION AND CONCLUSIONS

As revealed by the thorough and well presented Initial Decision, the legislative histories of Shipping Act sections 1 and 18(b) contain no statements concerning nonvessel operating carriers or true intermodal cargo movements. The 1916 House and Senate Reports on the bill that became the Shipping Act (H.R. 15455) say little other than to repeat the major recommendations of the Alexander Committee. The only jurisdictional debates involving foreign commerce concerned Senate Amendment No. 1 to H.R. 15455, which excluded all tramp vessels from regulation. See 53 *Congressional Record*, August 29, 1916, at 13365–13366, 13420 and 13426. The House Committee hearings on an earlier bill (H.R. 14337) are inconclusive, if not irrelevant, to the question of whether a direct vessel call at an United States port is necessary for the Commission's section 1 jurisdiction to attach.[20] If Congress in fact formulated an

[18] ACE argues that the absence of the word "port" is insignificant. It states that the word "port" was missing from the definition of *both* foreign commerce and interstate commerce carriers when section 1 was first reported out of Committee; the "regular routes from port to port" language was expressly added to the interstate definition to exclude tramp vessels from regulation, see *Rates of General Atlantic S.S. Co.*, 2 U.S.M.C. 681 (1943); *United States v. Stephen Bros. Line*, 384 F.2d 118 (5th Cir. 1967), and not to otherwise differentiate the two provisions. ACE also submits that the legislative history cited in the Initial Decision involved vessels carrying U.S. exports from Canadian ports and these vessels almost certainly touched U.S. ports during their voyage. Lack of a generalized "*United States presence*," argues ACE, was not the reason Committee witnesses stated that the Act would not reach these carriers. Rather, the testimony stressed the fact that in carrying U.S. cargo from Canada these vessels did not *physically touch U.S. ports*.

[19] ACE argues that in *Disposition of Container Marine Lines*, 11 F.M.C. 476 (1968) and *Filing of Through Rates and Through Routes*, 11 S.R.R. 574 (1970), the Commission expressly recognized its jurisdiction was over port-to-port and not inland rates; moreover, even if Detroit were considered to be a "port" in this instance, section 536.16 would not require a tariff to be filed because that section applies only to through routes involving a point of origin or destination *beyond a port area*.

[20] The testimony cited by the Presiding Officer was primarily concerned with possible United States losses to Canadian competition if the American shipping industry were strictly regulated.

intention as to how through container movements were to be handled in the 1970's, that intention was not disclosed in 1916 or 1961. What is clear is that the Shipping Act was conceived as a comprehensive regulatory system for oceanborne foreign commerce. Section 1 of the Act included the entire realm of ocean shipping which then existed, with the specific exception of contract carriers, ferryboats, and ocean tramps. The appearance of new technology alone is not a sufficient reason for limiting an agency's jurisdiction when the agency was otherwise intended to possess a broad and unified authority.[21]

The 1916 legislation limited the Commission's *in personam* jurisdiction in only three respects: (1) there must be a common carrier by water which is not a tramp or ferryboat; (2) the carrier must transport cargo between the United States and a foreign country; and (3) the Commission may not exercise "concurrent power or jurisdiction over any matter within the power or jurisdiction of the ICC."[22] These limiting factors have not been altered in the intervening 60 years. Our authority ebbs and flows as Congress modifies the powers and jurisdiction of the ICC, and we conclude that our foreign commerce jurisdiction is not restricted to ocean carriers operating vessels which physically call at United States ports. A common carrier engaged in the through transportation of goods "between the United States and a foreign country" *by water*, is subject to section 1. *Transshipment Agreement, Indonesia/United States*, 10 F.M.C. 183, 191 (1966).

This is not to say the Shipping Act permits the Commission to directly reach the port-to-port rate of an ocean carrier operating only between two foreign countries.[23] This we obviously cannot do. Neither do we envision section 1 as encompassing joint rate/through route international transportation offered by ICC regulated carriers via foreign ports in conjunction with ocean carriers are themselves subject to the Shipping Act.[24]

However, we conclude that ACE is performing all the functions of a nonvessel operating common carrier (NVO) in the foreign commerce of the United States. NVO's have been consistently recognized as section 1 carriers since at least 1952. *Bernhard Ulmann Co., Inc. v. Puerto Rico*

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[21] In *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), the Supreme Court affirmed the Federal Communication Commission's jurisdiction over cable television transmissions, and stated, at 172:

> Nothing in the language . . . history . . . or purpose [of the Communications Act] limits the [FCC's] authority to those activities and forms of communications that are specifically described by the Act's other provisions. . . . Certainly Congress could not in 1934 have foreseen the development of community television systems. . . .

[22] The latter restriction (Shipping Act section 33) was added to "obviate a conflict of jurisdiction if in some unforeseen manner any substantive provision of this bill inadvertently overlaps a corresponding provision of the Interstate Commerce Act." H.R. Report No. 659, *Creating A Shipping Board, Etc.*, 64th Cong., 1st Sess., at 34 (1916); Sen. Report No. 689, *Creating A Shipping Board, Etc.*, 64th Cong., 1st Sess., at 14 (1916).

[23] American goods exported to Canada on one bill of lading may be shipped elsewhere under a second bill of lading without directly involving this Commission's jurisdiction. However, extraterritorial aspects of section 15 agreements or other anticompetitive actions by section 1 carriers violative of sections 16 or 17 may be within the scope of the Shipping Act. See *Transpacific Freight Conference of Japan v. Federal Maritime Commission*, 314 F.2d 928 (9th Cir. 1963); *Pacific Seafarers, Inc. v. PFEL, Inc.*, 404 F.2d 804, n. 16 (D.C. Cir. 1968); *Imposition of Surcharge by the Far East Conference at Searsport, Maine*, 9 F.M.C. 129 (1966).

[24] Although no such ICC tariffs appear to be in effect at present, the ICC has reversed its long standing prohibition against joint rate/through route international tariffs to nonadjacent countries. *Ex Parte 261*, 337 I.C.C. 625–632 (1970).

Express Company, 3 F.M.B. 771, 775–778 (1952). They undertake to provide ocean transportation to the public and are subject to the same tariff filing requirements as vessel operating carriers (FMC General Order 13; 46 C.F.R. Part 536).

NVO's tend to operate exclusively from United States port cities, because most, if not all, NVO's exist only because of gaps in the coverage of the Interstate Commerce Act. See generally, *IML Sea Transit, Ltd. v. United States*, 343 F. Supp. 32 (N.D. Calif. 1972), aff'd *per curiam*, 409 U.S. 1002 (1972). One such exemption is the partial exclusion from Part II regulation for motor carriers operating entirely within a single "commercial zone" which is now benefiting ACE.[25] If ICC jurisdiction attached to the movement of ACE's cargo from Romulus to Windsor, then the motor carrier would be involved in joint through international transportation with a non-Shipping Act water carrier—subject solely to ICC regulation and to that agency's tariff filing requirements.

If an ICC regulated motor carrier and a section 1 water carrier offer a joint through international service, they must file a tariff listing their through rate and their respective rate "divisions" or "portions" at *both* the FMC and the the ICC. *Ex Parte 261*, 351 I.C.C. 490 (1976); *Filing of Through Rates and Through Routes*, 11 SRR 574 (1970). In contrast to both the above possibilities, ACE files no tariff in the United States or Canada and asserts immunity from regulation by either the ICC or this Commission.[26]

ACE's operation differs from other NVO's only in that it does not issue a bill of lading for its through service until the goods reach Canada (so its shippers can realize Australian entry duties), and the underlying water carrier does not call at a United States port. To accord jurisdictional significance to these artificially contrived distinctions would exalt form over substance. It would also leave a significant loophole in the Shipping Act's protective mantle.[27] There is a presumption against construing statutes in a manner which renders them ineffective or inefficient. *Bird v. United States*, 187 U.S. 118, 124 (1902); *United States v. Blasius*, 397 F.2d 203, 207, n. 9 (2nd Cir. 1968), *cert. dismissed*, 393 U.S. 1008 (1969). In the absence of express legislative direction, we must apply section 1 in the manner most likely to effectuate the undisputed remedial policies

[25] 49 U.S.C. 303(b)(8), adopted August 9, 1935, 49 Stat. 544. Detroit and Windsor are contiguous communities considered to be part of the same "commercial zone." *Verbeam v. United States*, 154 F. Supp. 431 (E.D. Mich. 1957), aff'd *per curiam*, 356 U.S. 676 (1958).

[26] The Part IV service of ACE's American subsidiary is beyond the scope of this proceeding as it merely delivers cargo to ACE's freight consolidation station in Romulus, Michigan, under a separate domestic bill of lading. It should be noted, however, that 49 U.S.C. 1018 prohibits Part IV forwarders from "employing or utilizing" any foreign commerce carriers and thereby establishing their own international through routes. The ICC also forbids its carriers (including Part IV carriers) from participating in joint rate/through route international transportation with NVO's. *Ex Parte 261*, 351 I.C.C. 490, 493 (1976).

[27] We find it significant that ACE now advertises an "ICC authorized" door-to-door service to the Far and Middle East as well as Australia. "Lump sum" door-to-door container rates are apparently being offered. See September, 1976, *Intermodal Container News*, at 110.

which motivated Congress generally to adopt the Shipping Act.[28] So long as ACE solicits and musters cargo in the United States and uses ICC exempt motor carriage to transport this cargo from the United States on a through route containing a significant transoceanic segment, ACE can and should be effectively regulated by this Commission. We do not perceive the ICC's limited regulation of the Romulus to Windsor, motor carriage as an obstacle to the exercise of our jurisdiction.[29] The joint exercise of ICC and FMC authority over a particular *person* does not constitute the type of "concurrent power" forbidden by Shipping Act section 33; that prohibition only prevents the two agencies from regulating the same commercial *activities* at the same time. *Alabama Great Southern Railroad Co. v. Federal Maritime Commission*, 379 F.2d 100 (D.C. Cir. 1967).

We recognize our present position could appear inconsistent with earlier statements interpreting our through route jurisdiction in different factual situations. For example, language in *Disposition of Container Marine Lines, supra*, if read in isolation, might be interpreted as disavowing all authority to regulate matters involving inland transportation.[30] Such an interpretation would be clearly erroneous. The Commission has long regulated more than the basic "port-to-port" movements of ocean carriers under Shipping Act sections 15, 16 and 17, and has prohibited ocean carriers from unfairly absorbing the inland transportation charges of ICC carriers. *E.g., City of Portland v. Pacific Westbound Conference*, 4 F.M.B. 664 (1955) and 5 F.M.B. 118 (1956), aff'd *sub nom., Pacific Far East Lines v. United States*, 246 F.2d 711 (D.C. Cir. 1957).

The true purpose of these previous descriptions of our jurisdiction as "port-to-port" was to disclaim any encroachment into the legitimate regulatory realm of the ICC at a time before the Commission and ICC had developed mutual procedures for the filing of joint through intermodal tariffs.[31] In no instance do such statements represent the actual holding

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[28] This was the approach followed not long ago by the United States Court of Appeals in ruling that the Federal Trade Commission had authority to adopt substantive industry regulation. *National Petroleum Refiners Association v. Federal Trade Commission*, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). There the Court held, at 686:

> In determining legislative intent, our duty is to favor an interpretation which would render the statutory design effective in terms of the policies behind its enactment and to avoid an interpretation which would make such policies more difficult of fulfillment, particularly where, as here, that interpretation is consistent with the plain language of the statute. . . .

[29] Only the health and safety regulations of 49 U.S.C. 304(1) apply to Part II motor carriers operating within "commercial zones." 49 U.S.C. 303(b).

[30] There the Commission stated:

> . . . we are inclined to agree with those intervenors which have maintained that the word "places" in section 18(b)(1) is not intended to include inland points because the jurisdiction of the Commission is only port-to-port (including services in terminal area . . .).

[31] Such an intention is apparent from a close reading of the *Sea-Land* decision cited by the Presiding Officer. The Commission rejected single-factor joint motor-water rates from Utah, Idaho and Montana to Honolulu because: (1) the ICC and FMC portions of the rate were not appropriately broken out; and (2) without such a break out it would have been necessary for the FMC to assert jurisdiction over the inland *portion* of the through rate when only the ICC had such authority. 11 F.M.C., at 142.

of the case, nor was the need for an *actual vessel call* at an United States port ever in issue.[32]

Inasmuch as ACE is a common carrier by water in foreign commerce within the meaning of section 1, it follows that ACE must file a tariff which fully complies with Part 536 of the Commission's Rules. Section 18(b) is unquestionably unclear when applied to a modern, intermodal operation such as ACE's. Yet, regardless of whether Detroit is a "port" within the meaning of section 18(b), or whether that section's "through route" language operates independently of the "to and from United States ports" language, there is a sound basis for requiring ACE to observe the same tariff filing practices as its competitors.

The legislative history of section 18(b) contains no indication that Congress intended to omit any class of section 1 carriers from tariff filing responsibilities, and, since the type of containerized intermodal service offered by ACE was unknown in 1961, the "to and from United States ports" language in the final version of the bill (H.R. 6775) adopted by the 87th Congress cannot reasonably be construed as a deliberate exclusion of foreign commerce carriers not physically calling at United States ports. Indeed, the probable explanation for changing the "between all points" language in the 87th Congress's H.R. 4299 and the version of H.R. 6775 reported by the House was the Federal Maritime Board's suggestion that this language be modified to make it clear that carriers need not file rates for carriage *between one foreign port and another foreign port.* Senate Committee on Commerce, *Index to the Legislative History of the Dual Rate Law,* Doc. No. 100, 87th Cong., 2d Sess. (1962), at 44–45, 132 and 218. This change was not considered a major amendment by the Senate, *id.*, at 219–225, was not discussed in the Conference Report, *id.*, at 444–446, and was not debated on the floor, *id.*, at 244, 246, 369, and 436–438. We therefore conclude that ACE is required by section 18(b) to file a tariff covering its through route transportation to Australia from Detroit.

Moreover, Part 536 is not jurisdictionally limited by section 18(b). Since 1961, the Commission's rule making authority has resided in Shipping Act section 43. This authority has been broadly interpreted by the courts and permits the adoption of substantive rules in furtherance of general Shipping Act objectives without a prior finding that a specific Shipping Act violation has occurred. *Pacific Coast European Conference v. Federal Maritime Commission,* 350 F.2d 197, 203–204 (9th Cir. 1965), *cert. denied,* 382 U.S. 958 (1965); *Alabama Great Southern Railroad Co. v. Federal Maritime Commission, supra,* at 103; *Outward Continental North Pacific Conference v. Federal Maritime Commission,* 385 F.2d 981 (1967); *New York Freight Forwarders and Brokers Assn. v. Federal Maritime Commission,* 385 F.2d 981 (1967); *New York Freight Forwarders and Brokers Assn. v. Federal Maritime Commission,* 337 F.2d 289,

[32] *Cf., Transshipment Agreement, Indonesia/United States, supra,* where the Commission *asserted* jurisdiction over "first" or connecting water carriers which did not themselves call at United States ports.

29–295 (2d Cir. 1964), *cert. denied,* 380 U.S. 910 (1965). The Commission's obligations to define and eliminate unreasonable preference and discrimination by ocean carriers pursuant to Shipping Act sections 16 First and 17 are sufficient to support the adoption of our Part 536 rules and their application to all foreign commerce carriers as defined in section 1.[33] See *Alabama Great Southern Railroad Co. v. Federal Maritime Commission, supra.*

Accordingly, it is ultimately found and concluded that ACE is, and since June 1972, has been, a common carrier by water in the foreign commerce of the United States subject to section 1 of the Shipping Act, 1916; that ACE has operated, and continues to operate, as such a carrier without having a tariff on file with the Commission; and, that ACE's operations without filing tariffs have violated, and continue to violate, section 18(b) of the Shipping Act, 1916, and section 536.16 of the Commission's Rules.

Wherefore, IT IS ORDERED, That Austasia Intermodal Lines, Ltd., American Container Express, Inc., and any subsidiary, affiliate, or division of either corporation employing the trade name "Austasia Container Express," CEASE AND DESIST from soliciting, extending, or holding out to the public any through service as a common carrier between the Detroit, Michigan, Commercial Zone and Australia until such time as "Austasia Container Express" shall file a tariff with the Federal Maritime Commission covering its through transportation between said locations which complies fully with Part 536 of the Commission's Rules, including section 536.16 thereof; and

IT IS FURTHER ORDERED, That this Order is hereby STAYED for thirty (30) days from the date of service indicated above in order to provide Austasia Container Express a reasonable opportunity to file its rates and charges in the format required by Part 536 of the Commission's Rules.

Vice Chairman Morse dissenting. I dissent and in so doing adopt the Initial Decision of Administrative Law Judge Norman D. Kline.

(S) JOSEPH C. POLKING,
Acting Secretary.

[33] Part 536 is plainly directed to all section 1 carriers. 46 C.F.R. 536.1; 536.16(b).

FEDERAL MARITIME COMMISSION

No. 75-31

CSC INTERNATIONAL, INC.

v.

WATERMAN STEAMSHIP CORP.

NOTICE OF ADOPTION

February 15, 1977

The initial decision on remand of Administrative Law Judge Charles E. Morgan was served in this proceeding January 17, 1977. No exceptions were filed. Notice is hereby given that upon consideration of the record in this proceeding the Commission has determined to adopt the initial decision except for the portion thereof relating to the application of the statute of limitations to this proceeding.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 75–31

CSC INTERNATIONAL, INCORPORATED

v.

WATERMAN STEAMSHIP CORPORATION

Adopted February 15, 1977

Shipment, described as drums, chemicals, NOI (2 Amino-2-Methyl-1-Propanol), found properly rated and charged as chemicals, rather than detergents. Complaint dismissed.

William Levenstein for the complainant.

Temple L. Ratcliffe for the respondent.

INITIAL DECISION ON REMAND[1] OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE

The prior initial decision found that the complaint was filed two years and one day after the cause of action accrued, and therefore that the complaint was barred. By Order on Remand served October 8, 1976, the Commission decided, by four-to-one vote, that the complaint was timely filed and that jurisdiction rested with the Commission. The said Order on Remand vacated the prior initial decision, and remanded the matter to the Administrative Law Judge for further proceeding and adjudication of the complaint on its merits. Inasmuch as the prior initial decision was vacated and because a party may plead lack of jurisdiction before a reviewing court, it appears advisable to comment on the circumstances of the filing of the complaint. In any event, as directed, the ultimate findings in this initial decision on remand will be concerned only with the merits of the complaint.

BACKGROUND. By formal complaint filed on Monday, August 18, 1975, the complainant alleged that it was overcharged $454.58 on a shipment described on the bill of lading as 64 drums chemicals NOI (2-Amino-2 Methyl-1-Propanol), ocean freight prepaid, shipped August 17, 1973, from New Orleans, Louisiana, destined to Keelung, Taiwan.

The shortened procedure was followed. Complainant sought to have

[1] This decision became the decision of the Commission February 15, 1977.

the shipment rated as detergents, instead of as chemicals. The shipment consisted of 17.15 measurement tons. The charges assessed, based on the contract rate on chemicals of $107.50 per ton, were $1,843.63, plus $6.47 for tolls and $17.84 for unloading. The charges sought by the complainant, based on the contract rate on detergents of $81 per ton, are $1,389.15, plus tolls and unloading. The rates are found in Far East Conference Tariff No. 25, F.M.C. No. 5.

The prior initial decision did not consider the alleged merits of the complaint, but found it barred by section 22 of the Shipping Act, 1916 (the Act), which provides that reparation may be awarded if the complaint is filed within two years after the cause of action accrued. This agency's jurisdiction is conferred only by statutes enacted by the Congress of the United States.

Notwithstanding that the written statutory law takes precedent over common law, and the unwritten common law applies only where there is no statute, the complainant on exceptions to the prior initial decision asked the Commission to apply a common law rule for the computation of the two-year statutory limitation period, so as to permit filing of the complaint on a succeeding business day when the last day of the statutory period fell on a Saturday, Sunday or legal holiday.

In addition, the complainant asked the Commission to assume statutory jurisdiction over the complaint in this matter because of the alleged hardship in filing the complaint within two years, when the Commission's offices were closed on Sunday, August 17, 1975, as well as on Saturday, August 16, 1975. The Commission stated in its order on remand that Sunday, August 17, 1975, was "the last day of the two-year limitation period," and that dismissal of the complaint under the circumstances would cause undue hardship.

Inasmuch as it was believed that the statute could not be amended by rulemaking, and since the two-year statute seemed to be without need for any interpretation, the prior initial decision pointed out that our Rules of Practice and Procedure necessarily were consistent with the two-year statutory period. Also the statute itself makes no reference to extensions for Saturdays, Sundays, or legal holidays.

The Commission considered these circumstances, and to avoid undue hardship, in the exercise of its discretion under the Rules of Practice and Procedure, waived pursuant to Rule 1(j) (46 CFR 502.10), the exception of Rule 5(c) (46 CFR 502.63), contained in Rule 7(a) (46 CFR 502.101), and concluded that the filing of the complaint on Monday, August 18, 1975, was timely. Vice Chairman Morse dissented for two reasons, one reason being that Congress said two years, not two-years and one day, and the other reason being that in his view there was no hardship, let alone undue hardship.

It is common knowledge that the Commission's offices are closed on Saturdays and Sundays, and for that matter after 5:00 p.m. on working weekdays. A reasonably prudent complainant or his attorney would act

accordingly and mail or file his complaint so that it would reach the Commission prior to a Saturday, Sunday or holiday two-year limitation period deadline. Lack of such foresight it is believed would condone carelessness rather than impose any undue hardship under the facts and circumstances of the present complaint which arose following an audit of freight bills by Ocean Freight Consultants, Inc., begun as early as or earlier than July 2, 1975.

Of further interest in this matter is the Commission's Notice of Proposed Rulemaking regarding GENERAL ORDER 16; DOCKET NO. 76–61, MISCELLANEOUS AMENDMENTS TO RULES OF PRACTICE AND PROCEDURE (41 F.R. 51621; November 23, 1976). By this notice, among other matters the Commission is giving consideration to amending section 502.101 of the Rules of Practice and Procedure by deleting the words "except section 502.63 (Rule 5(c))" from the first sentence. By this amendment the Commission would relax the rule in all complaint proceedings, as it has done in the present proceeding, No. 75–31, so that all complainants will not be prevented from seeking relief merely because the last day of the period of limitation happens to fall on a day on which the Commission's offices are closed. In comments filed regarding this proposed rule, Sea-Land Service, Inc., opposes this proposed change which would disregard a Saturday, Sunday or holiday in calculating the two-year statute of limitations if such a day were the last day of the statutory period. Sea-Land said that the present section 22 of the Act was approved by Congress and cannot be changed in a rulemaking proceeding, but must be the subject of amending legislation. The Maritime Administration Bar Association also is of the view that the Commission has no authority to narrow or to extend the two-year statute of limitations.

While it is believed that the statute is not subject to interpretation, it is submitted respectfully that if the two-year statutory period for jurisdiction is deemed subject to interpretation because of incompleteness or vagueness of the statute, then any interpretation of the statute should err, if at all, on the side of limiting rather than of expanding jurisdiction.

THE MERITS OF THE COMPLAINT. Assuming, as the Commission has directed, that the complaint was timely filed and that jurisdiction rests in the Commission, the issue is what commodity was shipped. Was it chemicals, detergents, or something else?

As a general rule, the nature of the commodity shipped, not its purchase or sales price, nor the commercial demand for it, nor the use to which it is put, determines the freight rate which should be applied. The record in the present proceeding has been combed carefully to ascertain all the facts relative to the nature of the shipment here in issue.

The complainant is a corporation whose principal business is the manufacture and distribution of chemicals and chemical products. The consignee of the shipment is the Lidye Chemical Co., Ltd., in Taiwan.

In Docket No. 75–50, *Commercial Solvents Corporation International,*

Inc. v. Moore-McCormack Lines, Inc., wherein the complaint was dismissed by the Commission as untimely filed, report of the Commission served January 4, 1977, the same complainant as in the present proceeding shipped the same commodity as in the present proceeding, namely 2-Amino-2-Methyl-1-Propanol (hereafter for convenience sometimes called AMP). Also in No. 75–50, as in the present proceeding, the bill of lading described the shipment as "Drums Chemicals NOI (2-Amino-2-Methyl-1-Propanol)." Ordinarily a bill of lading description is neither conclusive nor binding in a determination of the legal freight charges. But where the consignor or shipper was the manufacturer of the articles shipped, the description in the bill of lading may not be ignored. *Gulf Shipbuilding Corp v. Southern Pac. Co.*, 286 I.C.C. 153 (154). We now turn to various other factors in evidence, other than the bill of lading description.

In Docket No. 75–50 the complainant also was charged the rate on chemicals. In Docket No. 75–50 the same complainant sought to be charged the rate on "Compounds, Surface Active (Wetting Agents or Emulsifiers)." In the present proceeding, No. 75–31, the same complainant contends that the shipment should be rated as Detergents, Liquid or Dry non-hazardous, N.O.S.

The commodity shipped, *AMP*, is listed in a chemical dictionary (attachment 5 to the complaint). There it is also known as isobutanolamine and Ch C(CH)NH CH OH. It has certain properties. It is a colorless liquid or a white crystalline solid; it is completely miscible in water at 20 degrees Centigrade; its specific gravity is 0.934 at 20/20 degrees Centigrade; its boiling point is 165 degrees Centigrade; its melting point is 30–31 degrees Centigrade; its flash point is 153 degrees Fahrenheit; it is combustible and has low toxicity.

The chemical dictionary lists *three uses* for *AMP*, *one*, as an emulsifying agent (in soap form) for oils, fats and waxes; *two*, as an absorbent for acidic gases, *and three*, in chemical synthesis.

The chemical dictionary also defines an *emuslifier* as a surface-active agent.

The chemical dictionary also defines an *emulsion* as a stable mixture of two or more immiscible liquids held in suspension by small percentages of substances called emulsifiers.

The chemical dictionary also defines *surface active agent* as any compound that reduces surface tension when dissolved in water or water solutions, or which reduces interfacial tension between two liquids, or between a liquid and a solid.

Also it is stated in the chemical dictionary that there are *three categories of surface active agents*, namely *one*, detergents, *two*, wetting agents, *and three*, emulsifiers. It is said that all three have the same basic chemical mechanism and *differ* chiefly in the nature of the surfaces involved.

By this definition of surface active agent (surfactant), as per attachment

7 to the complaint, *detergents and emulsifiers differ from one another* chiefly in the nature of the surfaces involved.

By attachment 4 to the complaint, the complainant in its "NP Technical Bulletin," advertising nitro paraffins, states that "AMP is a very efficient emulsifying agent for the emulsifiable polyethylenes and waxes used in today's floor polish formulations. . . . " "Better synthetic waxes, polymers, and modifiers when used with emulsifiers such as AMP contribute the properties needed to protect, preserve, and beautify the substrates to which the many polishes available today are applied."

Thus, it appears by the complainant's own exhibits or attachments to its complaint that it shipped a product advertised by it for use as an emulsifier for waxes in floor polishes.

The complainant so far as this record shows apparently does not advertise AMP as a detergent.

In Docket No. 75–50, the complainant contended that AMP was an emulsifying agent, so sold by the complainant. The finding in the initial decision in No. 75–50 was that the commodity shipped therein was in fact an emulsifier for waxes, and the complainant did not except to this finding. The initial decision in No. 75–50 was made on the merits of the complaint, and it was not adopted by the Commission because the Commission found that that complaint was untimely filed. In the Commission's decision in No. 75–50, a discussion of the merits of the case was unnecessary in view of the finding of lack of jurisdiction.

From the above evidence it is concluded that *one of the uses of AMP is as an emulsifier*. It is further concluded that by chemical definition *emulsifiers differ from detergents*, and therefore that AMP when used an an emulsifier is not being used as a detergent. It is further found that there is nothing of record which shows that AMP ever was used or intended to be used as a detergent.

Furthermore, one use of a product does not necessarily determine the transportation nature for tariff purposes of a commodity. In fact by chemical definition, AMP has uses as an absorbent for acidic gases. An absorbent is not a detergent. Another use of AMP, by chemical definition, is in chemical synthesis. These two uses do not show that AMP is a detergent.

In fact different rates on the same commodity dependent upon the use made of it would lead to unjust discrimination. *Atchison Leather Products Co. v. Atchison, T. & S.F. Ry. Co.*, 274 I.C.C. 328 (329).

The nature and character of each shipment at the time tendered determines its status for rate purposes, and the use which may be subsequently made of the material does not control *Sonken-Galamba Corporation v. Union Pac. R. Co.*, 145 Fed. (2d) 808 (812).

There is no better entrenched rule in the making of rates and ratings than the one that a commodity cannot lawfully be rated or classified according to the different uses to which it is put *Food Machinery Corp. v. Alton & S.R.*, 269 I.C.C. 603 (606).

Actually in the present proceeding, the use of the AMP made by the consignee, the Lidye Chemical Co., Ltd., in Taiwan is not shown. We apparently must rely on such data as is found in the chemical dictionary. It must be borne in mind, also, that the burden of proof rests on the complainant.

Official notice is taken that a detergent generally has been considered to be a substance or mixture which has cleansing action because of a combination of properties including lowering of surface tension, wetting action, emulsifying and dispersing action and foam formation, that ordinary soap is the best known example, and that a detergent now is coming to mean the synthetic variety in distinction to soap which is derived from natural fats and oils. (See page 344 of the Chemical Dictionary, attached to complainant's reply memorandum.) The purpose of a reply memorandum is to rebut existing evidence and arguments, rather than to introduce new evidence, but the definition of a detergent certainly is helpful to this record and therefore is noticed, and since complainant sought to introduce page 344, surely complainant cannot object to its notice.

It should be remembered that many surface-active agents do not possess detergent properties, and hence that the terms surface-active agent and detergent are not synonymous. (Attachment 7 to the complaint.) This finding also may be confirmed by official notice of page 497 of Van Nostrand's Scientific Encyclopedia (1958).

The chemical definition of AMP does not state that it has a cleansing action or that it is used as a cleansing agent.

The complainant attempts to counter its own attachment 5, definition of AMP, by reference to the definition of an emulsion in its attachment 6. From the definition of an emulsion in attachment 6, the complainant interprets it to say that all emulsifiers both natural and synthetic are known collectively as detergents. But the chemical dictionary says, "q.v.," see the definition of detergents. And as noted the definition of detergents, both natural and synthetic, states that they have a cleansing action. Page 344 of the Chemical Dictionary states that synthetic detergents are surface active agents and have structurally unsymmetric molecules containing both hydrophilic, or water-soluble groups and hydrophobic or oil-soluble hydrocarbon chains. We must, if we rely on the Chemical Dictionary, take the direct definition of AMP in the dictionary, rather than rely on some other definition of AMP obtained by convoluting definitions of other items, such as of emulsions, in the same dictionary.

As seen, one use of AMP is as an emulsifier. An emulsifier is only one type of surface-active agent. Whereas all detergents are surface-active agents, it is not true that all surface-active agents are detergents. This record does not show that AMP is a detergent or that it has a cleansing action, or that it is used as a cleansing agent.

In part, the complaint relies on the thin thread of the chemical definition

of AMP, attachment 5, wherein one of the uses of AMP is as an "Emulsifying" agent (in soap form for oils, fats and waxes) but this is a very thin thread indeed because the fact that AMP may be used as an emulsifying agent (in soap form) does not make it a soap. AMP in this use is an emulsifying agent.

The AMP here in issue was shipped by the complainant, a manufacturer of chemicals and a distributor of chemicals; the bill of lading described AMP as chemicals; the consignee was a chemical company; AMP is defined in a chemical dictionary; and one of the uses of AMP is in chemical synthesis.

From all of the above positive circumstances, and also because of the negative circumstance that the chemical dictionary states that detergents and emulsifiers differ, it is concluded that AMP is not a detergent and is in fact a chemical.

A search of the applicable tariff in this Far East Conference trade does not whow any rate on emulsifiers or emulsifying agents, and in any event that is only one use of AMP. Furthermore, the Far East Conference agrees that the respondent charged the proper rate and that AMP is strictly a chemical.

In addition, the classification and rating of AMP as a chemical is clearly in conformity with the classification of AMP contained in the Statistical Classification of Domestic and Foreign Commodities Exported from the United States, U.S. Schedule B, which is published by the U.S. Department of Commerce. (See Exhibit E attached to respondent's memorandum, page 75, section 5. Chemicals, schedule number 512.0945.

From all of the above facts and circumstances, it is found and concluded that the shipment of AMP here in issue properly was rated and charged as chemicals.

The complaint is dismissed.

(S) CHARLES E. MORGAN,
Administrative Law Judge.

WASHINGTON, D.C.,
January 17, 1977.

FEDERAL MARITIME COMMISSION

DOCKET NO. 74-18

DOW CHEMICAL INTERNAIONAL, INC.

v.

AMERICAN PRESIDENT LINES, LTD., ET AL.

A proper tender of cargo by a shipper to a carrier consists of an unconditional offer to deliver the cargo, coupled with a manifested ability to carry out that offer, and production of the cargo at the time and place of the offer.

Where the shipper presented itself with its cargo at the gate to the carrier's dock, and received there both permission to enter onto the dock and directions to that portion of the dock known as the container yard; and, where the shipper, with its cargo, proceeded to that container yard, there offering to the carrier the documents identifying its cargo, the shipper tendered its cargo to the carrier at the container yard, not the gate givng entry to the dock.

Where a handling charge applies to cargo tendered at the container yard but not the dock, and the shipper tenders cargo at the container yard located wholly within the dock, the tariff containing the handling charge is ambiguous as to the applicability of the handling charge.

Ambiguous tariffs are to be construed against the carrier drafting the tariff, but, such construction must be fair and reasonable.

Where some carriers participating in a tariff have container yards located on their respective docks, and other carriers participating in that tariff have container yards off of their respective docks, and that tariff provides, generally, for a handling charge on cargo tendered at the container yard or the dock, but specifically exempts cargo tendered at the dock from the handling charge, the word "dock" in the exemption includes the container yard located wholly within the dock.

Where the shipper tendered cargo to the carrier at the carrier's container yard, located wholly within the carrier's dock, the cargo so tendered is exempt from the handling charge cargo tendered to the carrier's dock.

Robert R. Tierman and *Peter M. Nemkov* for Complainant, Dow Chemical International, Inc.

Edward D. Ransom and *Barbara H. Buggert* for Respondents, American President Lines, Ltd.,; Barber Lines A/S; Pacific Far East Line, Inc.; Sea-Land Service, Inc.; United States Lines, Inc.; Zim Israel Navigation Company, Ltd.; Kawasaki Kisen Kaisha, Ltd.; Showa Shipping Company, Ltd.; States Steamship Company; and Intervenor, Pacific Westbound Conference.

REPORT

February 22, 1977

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Ashton C. Barrett, Bob Casey and James V. Day, *Commissioners)*

This is a complaint proceeding. The Complainant, Dow Chemical International, Inc., is engaged principally in the overseas marketing of chemicals, plastics, pharmaceuticals, and related items. Respondents are nine common carriers by water, members of the Pacific Westbound Conference.[1] *The Pacific Westbound Conference intervened in the proceeding.*

The complaint seeks reparations from Respondents totalling $20,438.43, alleged to be the total amount of handling charges assessed Complainant by Respondents during the period August 13, 1973 to April 1, 1974, which handling charges are alleged to be in excess of those authorized by the applicable tariff, to wit: the Pacific Westbound Conference Local Freight Tariff No. 3–FMC–8.

Complainant alleges that the Complainant tendered shipper-packed containers to Respondents at their respective docks, and that the applicable tariff did not authorize the assessment of handling charges on shipper-packed containers tendered to the carriers' docks. The overcharges are alleged to be in violation of section 18 of the Shipping Act, 1916. In Respondents' answer, Respondents admitted all of the pro forma allegations contained in the complaint, but denied that Complainant tendered all cargo in shipper-packed containers to Respondents at their respective docks. To the contrary, Respondents alleged that Complainant's cargo, in shipper-packed containers, was tendered to Respondents at their respective container yards (CY's), and that the applicable tariff, the Pacific Westbound Conference Local Freight Tariff No. 3–FMC–8, authorized the assessment of handling charges on shipper-packed containers tendered to the carriers' container yards. Respondents denied that section 18 of the Shipping Act, 1916, had been violated.

The matter was assigned to an administrative law judge for hearing and decision. Administrative Law Judge John E. Cograve issued an Initial Decision, wherein the complaint was dismissed. Complainant excepted to that decision, Respondents replied, and the Commission heard oral argument. The Initial Decision is reversed, and this Report is submitted in lieu thereof.

Complainant and Respondents entered into a stipulation of facts, and put in evidence interrogatories, the answers thereto, requests for admission, and the answers thereto, all of which constitutes the evidence of record in this proceeding.

[1] American President Lines, Ltd.; Barber Lines, A/S; Pacific Far East Line, Inc.; Sea-Land Service, Inc.; United States Lines, Inc.; Zim Israel Navigation Company, Ltd.; Kawasaki Kisen Kaisha, Ltd.; Showa Shipping Company, Ltd.; and States Steamship Company.

All of the Respondents herein are common carriers by water engaged in transportation from U.S. Pacific Coast ports to ports in one or more of the following places: Japan, Hong Kong, Manila, the People's Republic of China, Taiwan, South Korea, Vietnam, and Thailand. At all times between August 13, 1973 and April 1, 1974 each Respondent was a member of the Pacific Westbound Conference, and party to the Local Freight Tariff No. 3–FMC–8, published by that Conference.

In the period from August 13, 1973 to April 1, 1974 Complainant made 147 separate shipments, on the vessels of Respondents, from the Pacific Coast of the United States to destinations in the Far East, including Japan, Hong Kong, Manila, and Kaohsiung and Keelung in Taiwan. Those 147 shipments were divided among Respondents as follows:

Respondents	*Number of Shipments*
American President Lines, Ltd.	90
Barber Lines, A/S	1
Pacific Far East Line, Inc.	4
Sea-Land Service, Inc.	41
United States Lines, Inc.	2
Zim Israel Navigation Company, Ltd.	4
Kawasaki Kisen Kaisha, Ltd.	1
Showa Shipping Company, Ltd.	2
States Steamship Company	2

Each of those shipments consisted solely of containers packed by Complainant. The tariff applicable to each of those shipments was the Pacific Westbound Conference Local Freight Tariff No. 3–FMC–8, in which each Respondent participated, and by which each Respondent was bound. All rates, rules, regulations, and charges applicable to each of those shipments were contained in that tariff.

In addition to the nine carriers respondent in this proceeding, several other carriers are members of the Pacific Westbound Conference, and participate in the Pacific Westbound Conference Local Freight Tariff No. 3–FMC–8.

Complainant shipped the shipments identified above from several ports on the Pacific Coast of the United States. Those ports were San Francisco, Oakland, Los Angeles, San Pedro, and Long Beach. Each Respondent loaded Complainant's cargo at one or more of those ports during the period from August 13, 1973 to April 1, 1974.

Respondents and the several other members of the Pacific Westbound Conference conduct their common carrier operations in the several ports on the Pacific Coast of the United States. Each of those ports identified above were designated by the carriers in conference as terminal ports. In each terminal port each carrier, if it served that port, had one terminal dock. That terminal dock encompassed the pier or wharf, backup spaces, administrative offices, parking lots, and other facilities used in the conduct of the ocean common carriage business. The terminal dock was usually

enclosed by a fence. The carriers who were members of the Pacific Westbound Conference agreed among themselves that each carrier could designate a location within the terminal port as that carrier's container yard. The container yard could have been located within the carrier's terminal dock, or at some place off of the carrier's terminal dock, but within the terminal port. The members of the conference were not required to designate a container yard, but, if a carrier designated a container yard, then that container yard was the one location where the carrier was permitted to receive containers for shipment which had been packed by the shipper. If a carrier did not designate a container yard, then that carrier could recieve shipper-packed containers only at its terminal dock. At all times between August 13, 1973 and April 1, 1974, each Respondent had a container yard within their respective terminal docks.

The carriers also agreed among themselves that each carrier could receive cargo from shippers, to be packed by the carrier into containers, both at the terminal dock or at some place other than the terminal dock, but within the terminal port. If the carrier had established a place other than the terminal dock for the receipt of cargo to be packed into containers by the carrier, that place was designated as the container freight station.

For each of the shipments identified above Complainant followed the same procedure. Complainant packed a container with its cargo at one of its plants. A freight forwarder was selected to coordinate the movement of that container from the plant to the Respondent for on-carriage to the overseas destination. The container was transported by a motor common carrier, under an inland bill of lading, from Complainant's plant to Respondent's terminal dock. At the gate giving entrance to Respondent's terminal dock the motor common carrier was issued a gate pass by the security guard, and then directed by that guard to the gate giving entrance to Respondent's container yard. At the container yard gate the motor common carrier presented the inland bill of lading to Respondent's clerk, who issued a receipt for the container to the motor common carrier. The clerk then directed the motor common carrier to a point within the container yard where the container was removed from the chassis of the motor common carrier.

Respondents assessed and collected from Complainant, for each of the shipments identified above, a handling charge at the rate of $1.75 per ton. The totals of the handling charges assessed and collected from Complainant by each Respondent are as follows:

Respondent	*Handling Charges*
American President Lines, Ltd.	$ 9,841.79
Barber Lines, A/S	249.90
Pacific Far East Line, Inc.	780.94
Sea-Land Service, Inc.	8,313.63
United States Lines, Inc.	71.40

Respondent	*Handling Charges*
Zim Israel Navigation Co., Ltd.	428.40
Kawasaki Kisen Kaisha, Ltd.	357.00
Showa Shipping Company, Ltd.	145.93
States Steamship Company	249.44
Total	$20,438.43

Each Respondent asserts the Pacific Westbound Conference Local Freight Tariff No. 3–FMC–8 as the basis for the assessment and collection of those handling charges.

That tariff contained many rules pertaining to the carriage of cargo by Respondents and the other members of the Conference. Among those rules were two of particular applicability to the matter at issue in this proceeding, *i.e.*, Rules Nos. 70B and 19.

Rule 70B related to cargo carried in containers to Far East ports, including Japan, Hong Kong, Manila, and Kaohsiung and Keelung in Taiwan. As originally stated in the tariff, on March 15, 1969, that Rule provided that, "Shipper packed containers tendered to carrier at his CY or dock are not subject to the handling charge or container service charge." (Rule No. 70B1 (a)). On May 9, 1973 that Rule was changed by the addition of the words "provided in Rule No. 19." As so changed, the Rule provided that, "Shipper packed containers tendered to carrier at his CY or dock are not subject to the handling charge or container service charge provided in Rule No. 19." On August 13, 1973 the Rule was again changed so as to delete the words "not" and "or container service charge", and to add the word "as". As so changed, the Rule provided that, "Shipper packed containers tendered to carrier at his CY or dock are subject to the handling charge as provided in Rule No. 19." The Rule was not further changed until April 1, 1974. The word "dock", as used in that Rule, meant terminal dock. The abbreviation "CY", as used in that Rule, meant "the location designated by carrier in the port terminal area where (1) the carrier assembles, holds, or stores containers; and (2) where containers packed with goods are received or delivered." (Rule No. 70(3))

Rule No. 19 related to handling charges at United States loading ports. That Rule provided generally that, for a fee, the carrier would handle cargo from places alongside the ship and places on the terminal to the end of the ship's tackle. (Rule No. 19(a) and (b)). The Rule also exempted several categories of cargo from the handling charge, including cargo handled directly by the ship's tackle and cargo moving directly to the ship's hold by gravity or mechanical conveyor. (Rule No. 19(c) 1 through 5). The Rule also contained an exemption for certain containerized cargo. (Rule No. 19(c)6). From January 1, 1973, at least, that last exempting provision was as follows:

The Handling Charge will not apply—

6—On cargo tendered at Container Yard (CY), Container Freight Station (CFS) or carrier's dock and moving under the provisions of Rule No. 70(B). (See Rule 70(B), paragraph 1(b), for container service charge.)

On August 13, 1973 that provision was changed so as to delete the phrase "Container Yard (CY),". As so changed, the provision was as follows:

The Handling Charge will not apply—

6—On cargo tendered at Container Freight Station (CFS) or carrier's dock and moving under the provisions of Rule No. 70(B). (See Rule 70(B), paragraph 1(b), for container service charge.)

The Rule was not further changed until April 1, 1974. The "Rule 70(B), paragraph 1 (b)," referred to in Rule No. 19(c)6, was Rule No. 70B1.(b), which provided for the assessment of a container service charge of varying amounts on cargo parked into containers by the carrier.

Complainant was assessed the handling charge on all of its shipper-packed containers shipped via Respondents on and after August 14, 1973. On October 10, 1973 Complainant communicated to the Pacific Westbound Conference its objection to the assessment of the handling charge. Thereafter, the Pacific Westbound Conference filed with this Commission an amendment to the exempting provision of Rule No. 19(c)6 so as to provide that the handling charge would not apply on "cargo tendered at carrier's Container Freight Station (CFS) or dock for packing into containers by carrier under the provisions of Rule No. 70(B). (See Rule 70(B), paragraph 1(b), for application of container service charge.)" That amendment was to have been effective on October 17, 1973, and recited that it was filed for clarification of the language. The amendment was rejected by the Bureau of Compliance of this Commission because it resulted in an increase in cost to the shipper, and had not been filed in compliance with the notice requirements of the Shipping Act, 1916. After the rejection of that amendment, Respondents continued to assess and collect the handling charges from Complainant. Effective on April 1, 1974, the handling charge was deleted from the tariff, and a Terminal Receiving Charge was instituted in its place.

In the Initial Decision the Presiding Officer found that Complainant delivered its containers to Respondents' container yards and that the interpretation of Respondents' tariff proffered by Complainant was unfair and unreasonable, bordering on the absurd. As a consequence, the Presiding Officer rejected that interpretation, and dismissed the complaint.

The Presiding Officer failed to decide whether or not Respondents' tariff was ambiguous, and ignored an alternative interpretation of the tariff proffered by Complainant. In so doing, the Presiding Officer erred.

Complainant made two arguments to the Presiding Officer. Complainant first argued that, since, on each shipment, Complainant presented itself at the gate giving entrance to the carrier's terminal dock with the container, and there offered to deliver the container to the carrier, Complainant tendered its shipper-packed container to the carrier at that gate. Complainant argued that at all times after its arrival at the gate to the carrier's terminal dock Complainant was under the direction and control of the carrier, and that it was the carrier who caused the container to be moved

to the container yard, located wholly within the terminal dock. Consequently, argued Complainant, tender was made to the carrier at the gate giving entrance to the terminal dock.

Complainant's second argument was that, since, for each shipment at issue in this proceeding, the carrier's container yard was located wholly within its terminal dock, Complainant's tender of its shipper-packed container to the carrier at the carrier's container yard was tender at the carrier's terminal dock within the meaning of the tariff.

Respondents argued that Complainant tendered its shipper-packed containers to Respondents at their container yards. According to Respondents, a tender is complete when the tenderor offers to deliver the cargo, relinquishes control over the cargo, and has nothing further to do to effectuate deliver of the cargo. Under such a definition of tender, according to Respondents, Complainant tendered its cargo at Respondents' container yards, because it was only at the container yards that the Complainant offered to deliver, and relinquished control over, the cargo.

Respondents rejected the second argument of Complainant by asserting that Complainant was estopped from arguing that tender at the container yard was tender at the dock within the meaning of the tariff because Complainant has admitted that, if the cargo was tendered at the container yard, the handling charge was properly assessed against Complainant.

Respondents further argued that their tariff was not ambiguous because the tariff provisions were clear on their face, the terms used therein were defined in the tariff, and because a fair and reasonable construction must be given to the tariff.

Complainant tendered its shipper-packed containers to Respondents at their respective container yards. At the common law a tender consists of an unconditional offer to perform, coupled with a manifested ability to carry out the offer, and production of the subject matter of the tender. *Collins v. Kingsberry Homes Corporation*, 243 F. Supp. 741 (N.D. Ala. 1963), *aff'd.*, 347 F.2d 351 (5th Cir. 1965). This Commission's decisions regarding tender for delivery by an ocean common carrier are only particular applications of the general common law rule, and contain each of the elements enunciated in *Collins, above*. Contrary to the argument of Complainant, the evidence of record in this proceeding does not support a finding that Complainant offered to deliver its shipper-packed containers to each Respondent at the gates giving entrance to each Respondent's terminal dock. Complainant arrived at that gate, was issued a gate pass, and was directed to the container yard. That sequence of events does not constitute an offer to deliver. At the gate giving entrance to the container yard of Respondent, Complainant offered to Respondent the inland bill of lading documenting the shipper-packed container of Complainant. That act constituted an offer to deliver the container. Complainant had the container there at the gate, and had there the ability to deliver the container to Respondent. Thus, Complainant tendered its shipper-packed container to each Respondent at the gate giving entry to each Respond-

ent's container yard, not at the gate giving entrance to each Respondent's terminal dock.

The determination of the geographic locations where Complainant tendered its shipper-packed containers to Respondents does not resolve the dispute in this proceeding. It is necessary to also determine whether or not Respondents' tariff was ambiguous, and, if so, the correct construction of that tariff.

In this regard, contrary to the argument of Respondents, Complainant was not estopped by its admission, that the handling charge was properly assessable on cargo tendered to Respondents at their container yards, from advancing its second argument that tender at the container yards was tender at the docks within the meaning of Respondents' tariff. Complainant's admission can be reasonably read only to mean that the handling charge was properly assessable against cargo tendered at the container yard, within the meaning of Respondents' tariff.

The Commission finds that Respondents' tariff was ambiguous in regard to the assessment of the handling charge, and that a fair and reasonable construction of that tariff which is favorable to Complainant results in a finding that Complainant tendered its shipper-packed containers to Respondents at their respective docks, within the meaning of the tariff.

Respondents' tariff was ambiguous. Prior to August 13, 1973, Rule No. 70B1.(a) of Respondents' tariff provided that shipper-packed containers tendered to the carrier at the container yard or the dock were not subject to the handling charge provided in Rule No. 19. At the same time Rule No. 19(c)6 provided that cargo tendered to the carrier at the container yard, the container freight station, or the dock, and moving under the provisions of Rule No. 70B, was exempt from the handling charge imposed by Rule No. 19. Effective on August 13, 1973, and continuing to April 1, 1974, the rules were changed. During that period Rule No. 70B1.(a) provided that shipper-packed containers tendered to the carrier at the carrier's container yard or dock *were* subject to the handling charge, *as provided in Rule No. 19*. The shipper was, then, by Rule No. 70B1.(a) referred to Rule No. 19 to determine when the handling charge was to apply. As changed, Rule No. 19(c)6 provided that the handling charge did not apply to cargo tendered to the carrier at the carrier's container freight station or dock, and moving under the provisions of Rule No. 70B. Cargo moving under the provisions of Rule No. 70B included shipper-packed containers and cargo to be packed into containers by the carrier. Where, as here, the container yard of the carrier was located wholly within the dock of the carrier, and, where, as here, the shipper tendered the cargo to the carrier at that container yard, a problem is encountered. Should the handling charge have applied because the cargo was tendered at the container yard, or should the handling charge not have applied because the cargo was tendered at the dock? The interrelationship of Rules No. 70B1.(a) and 19(c)6 was ambiguous, and the tariff of Respondents must be construed.

It is now well settled that ambiguous tariffs are to be construed against the carrier drafters thereof, but, that such construction must be fair and reasonable. *Thomas G. Crowe, etal v. Southern Steamship Company, et al.*, 1 U.S.S.B. 145 (1929); *Rubber Development Corporation v. Booth Steamship Company, Ltd., et al.*, 2 U.S.M.C. 746 (1945).[2]

In this case Respondents argue that since all the words used in the tariff were defined in the tariff, the tariff was not ambiguous. But, at the same time, Respondents assert that the tariff contained a redundancy. That is, Respondents assert that, in Rule No. 70B1.(a), in the phrase "CY or dock", where the CY was located within the terminal dock, the word "dock" redundantly referred to that portion of the terminal dock wherein the CY was located.

Complainant, on the other hand, argues that where the CY was located within the terminal dock, delivery to the CY was delivery to the dock, within the meaning of the tariff.

The tariff at issue here, Pacific Westbound Conference Local Freight Tariff No 3–FMC–8, applied to not only the Respondents in this proceeding but to all of the other carriers who were members of the Pacific Westbound Conference. While all of the Respondents in this proceeding had a container yard located on their respective terminal docks, not all of the members of the PWC did so. Some of the members of the Conference maintained container yards at locations outside of their respective terminal docks.[3]

The different locations of the container yards provides the key to a construction of the tariff which is fair and reasonable, and which assigns meaning to each of the words in the tariff. Respondents' assertion that the word "dock" was redundant in Rule No. 70B1.(a) is rejected, because the construction of a tariff which gives meaning to all the words used in the tariff is to be preferred over one which renders words meaningless.

The abbreviation "CY", as used in Rule No. 70B1.(a), was specifically defined in Rule No. 70 as the location where the carrier received shipper-packed containers. The word "dock", as used in Rule No. 70B1,(a), was

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[2] The cases cited by Respondents, *Buckley Dunton Overseas, S.A. v. Blue Star Shipping Corporation*, 8 F.M.C. 137 (1964), and Complainant, *The Gelfand Manufacturing Company v. Bull Steamship Line, Inc.*, 1 U.S.S.B. 169 (1930), are clearly distinguishable from the case at issue here. In *Buckley* the asserted ambiguity in the tariff was alleged to be in the distinction, or lack thereof, between the words "bales" and "units" in the following tariff provision:

Item 269 *Charges for Wharfage and Handling* (in cents per ton of 2,000 pounds).

Wood Pulp, in bales 1,000 pounds and over, 69 ¢
In units under 1,000 pounds 95 ¢

In that case, it was apparent on the face of the tariff that the word units meant bales, resulting in no ambiguity. Consequently, the Commission denied reparations to Complainant.

The *Gelfand* case was not so much an ambiguity case as it was a definitional one. The question presented in *Gelfand* was whether or not a rate for canned goods included foodstuff preserved in glass jars. The Commission found that the commonly understood definition of car included glass jars, and that the carrier's classification system defined can so as to include glass jars. Consequently, the Commission awarded reparations to Complainant.

[3] Respondents, in their answers to interrogatories, stated that the CY ". . . in most instances . . ." was located on the terminal dock. From that statement the Commission infers that some of the members of the Pacific Westbound Conference maintained container yards at locations other than on their respective terminal docks.

not defined in that rule. However, Respondents have admitted that the word "dock" meant terminal dock, which was that area, usually enclosed by a fence, wherein the carrier conducted its common carrier operations. The dock included, the pier or wharf, administrative offices, parking lots, backup areas, and, in some cases, the container yards.

It is clear that Respondents intended to subject some shipper-packed containers to the handling charge provided in Rule No. 19.[4] The members of the Pacific Westbound Conference which maintained container yards at a location off ot their respective docks would have incurred expenses associated with handling containers from those container yards to the end of ship's tackle on the pier located within their respective docks. It is to be expected that those costs would have been greater, all other things being equal, than the costs, incurred by those members of the Conference which maintained container yards on their respective docks, for handling containers from the nearer container yard to the end of ship's tackle on the pier within the dock. It would not have been unreasonable, then, for cargo tendered at the distant container yard to be assessed a handling charge, while cargo tendered at the nearer container yard to not be assessed a handling charge.

The other exemptions in Rule No. 19 were related to reduced costs on the part of the carrier. The first five exemptions dealt with categories of cargo on which the handling was minimal. Those categories included cargo lifted directly by the ship's tackle from lighters or railroad cars located alongside the ship, and cargo moving directly into the hold by mechanical means. A similar cost relationship is discovered in the exemption for cargo tendered to the carrier for packing into containers by the carrier. Such cargo was subjected to a container service charge, approximating $3.00 per ton, by Rule No. 70B1.(b).

Therefore, the Commission finds that the word "dock", as used in Rule No. 70B1.(a) and Rule No. 19(c)6, meant the terminal dock, and included any container yard located within the terminal dock.

As so interpreted, Rules No. 70B1.(a) and 19(c)6 related reasonably one to the other. Effective on August 13, 1973, Rule No. 70B1.(a) provided that shipper-packed containers tendered to the carrier at the carrier's container yard, be it on dock or off dock, or to the carrier's dock, were subjected to the handling charge, *as provided in Rule No. 19*. The shipper was, therefore, by Rule No. 70B1.(a), referred to Rule No. 19 to determine the applicability of the handling charge. In Rule No. 19(c)6 the shipper would have discovered that cargo moving under the provisions of Rule No. 70B, which applies to both shipper-packed containers and carrier-packed containers, was exempt from the handling charge if that cargo was tendered to the carrier at the carrier's container freight station or the carrier's dock. Since the word "dock" included an

[4] Respondents refused to answer questions, propounded by Complainant, regarding the purposes of the changes in the Rule effected on August 13, 1973 and April 1, 1974. The record is, therefore, without direct evidence regarding the purposes of these rule changes, leaving the discernment of those purposes to inference.

on dock container yard, tender of shipper-packed containers to the carrier at the carrier's on dock container yard, would have been tender to the carrier at the carrier's dock, within the meaning of Rule No. 19(c)6, and such cargo would have been exempt from the handling charge. However, cargo tendered to a carrier at the carrier's off dock container yard would have been subject to the handling charge.

Because Complainant tendered its shipper-packed containers to Respondents at their respective on dock container yards, Complainant tendered its shipper-packed containers to Respondents at their respective docks, as that word is used in Rule No. 19(c)6. Complainant's cargo was, therefore, exempt from the handling charge provided for in Rules No. 70 and 19. Because Respondents assessed against, and collected from, Complainant a handling charge of $1.75 per ton on that cargo so tendered, Respondents violated section 18(b)(3) of the Shipping Act by charging and collecting a greater compensation for a service in connection with the transportation of property than the charge specified in the applicable tariff on file with this Commission. Complainant has been injured by that violation in the amount of $20,438.43. Each Respondent will be required to return to Complainant those amounts collected by that Respondent from Complainant in excess of the amount authorized by the applicable tariff. An appropriate order will be entered.

Vice Chairman Clarence Morse, dissenting.

I dissent.

The parties hereto stipulated pursuant to Rule 10(v) of the Commission's Rules of Practice and Procedure that:

14. The tariff provisions relevant to this proceeding are Rule 1, Rule 5, Rule 19(c)(6), Rule 70, and Rule 70(B) and relevant revisions thereto. Authentic and genuine copies of tariff pages which contain these provisions are included in attachments to the Amended Complaint or in Answers and Objections of Respondents to Interrogatories and Requests for Admissions of Complainant dated August 2, 1974.

15. Under date of May 9, 1973 Pacific Westbound Conference amended Rule No. 70(B) of said tariff (24th Revised Page 53) to read in significant part as follows:

"Shipper packed containers tendered to carrier at his CY or dock are *not* subject to the handling charge or container service charge provided in Rule No. 19." (Emphasis added)

"(A)" "(Shipper packed containers tendered to carrier at his CY or dock *are* subject to the handling charges provided in Rule No. 19.)" (A) Effective August 13, 1973.

The statement in parenthesis was the amendment inserted in the tariff in May so as to provide 90 days notice of its effectiveness on August 13, 1973 as noted in the tariff with the symbol "(A)". Complainant received the notice of this change in compliance with the General Commodity Contract Rate Agreement. Subsequently the language which existed prior to the May 9th amendment and which continued in effect until August 13, 1973 was removed, and this section of the tariff was amended (28th Revised Page 53, Effective September 12, 1973) to read:

"Shipper packed containers tendered to carrier at his CY or dock are subject to the handling charge as provided in Rule No. 19."

This language remained unchanged during the period covered by the Complaint.

16. Under date of May 15, 1973 Pacific Westbound Conference amended Rule No. 19(c)(6) of said tariff (5th Revised page 31) to read in significant part as follows:

"The Handling Charge Will Not Apply—On cargo tendered at Container Yard (CY) *(Container Yard (CY) to be deleted 8/13/73)*, Container Freight Station (CFS) or carrier's dock and moving under the provisions of Rule No. 70(B).

The amendment was the underscored language [sic] not to be effective until 8/13/73. Complainant received the notice of this change in compliance with the General Commodity Contract Rate Agreement.

17. After Dow raised a question (by telex to PWC dated October 10, 1973) as to Dow's interpretation of this provision, PWC filed a revised Rule No. 19(c)(6) of said tariff (6th Revised Page 53, Effective October 17, 1973) to read in significant part as follows:

"The handling charge will not apply—On cargo tendered at carrier's Container Freight Station (CFS) or dock *for packing into containers by carrier* under the provisions of Rule No. 70(B)." (Emphasis added)

Sixth Revised Page 31 was rejected by the FMC Bureau of Compliance on the contention that it was not just a clarification but resulted in an increase. Accordingly, PWC re-published Rule No. 19(c)(6) (7th Revised Page 31, Effective November 12, 1973) in the same form as the Rule appeared at 5th Revised Page 31 filed May 15, 1973.

18. As of April 1, 1974 handling charges as had previously been in the tariff were eliminated. The Amended Complaint is not concerned with provisions of the tariff in effect April 1, 1974 and thereafter.

19. Rule 70(3) of said tariff (Original Page 48, Effective March 5, 1969, and in effect at all times pertinent to the Amended Complaint) defines the term container yard (CY) as follows:

"(3) *Container Yard* (CY): The term "container yard" (CY) means *the* location designated by carrier in the port terminal area where (1) the carrier assembles, holds or stores containers *and* where containers packed with goods are received or delivered." (Emphasis added)

20. By Rule No. 5 in effect at all times pertinent to the Amended Complaint, each carrier declares an assigned terminal dock in each port served. (6th Revised Page 27, Effective May 13, 1973.)

21. By Rule No. 1 in effect at all times pertinent to the Amended Complaint each carrier may have in each terminal port "*one* location in the port terminal area designated as their CY *where* containers packed with goods may be received." The one CY may be either off-dock or on-dock (4th Revised Page 23, Effective January 10, 1972.) (Emphasis added)

22. During all times pertinent to the Amended Complaint the CY of each of the respondents named in the Amended Complaint in each of the ports referred to was located within their respective terminal docks.

Each shipment referred to in the Amended Complaint was transported to the respective ocean carrier's terminal dock by a motor common carrier selected by the shipper. Said common carrier with possession of the inland bill of lading on arrival at the entrance to the ocean carrier's terminal dock was issued a gate pass and then directed by a security guard to the container yard gate. At the container yard gate the common carrier presented a document or documents (including the inland bill of lading) identifying the container being delivered, a receipt (including in most cases the inland bill of lading) was issued to the said motor common carrier executed on behalf of the ocean carrier and the motor common carrier was directed to a location in the container yard for removal of the container.

Summarizing the foregoing, the *ports* served are identified. The assigned *terminal dock* within each port is identified in writing to the Conference Chairman. In addition, each carrier (1) must declare in writing to the Conference Chairman when it elects to have *an off-dock CFS*

where loose cargo may be received for stuffing into a container in addition to its on-dock facilities for so stuffing loose cargo into containers (and as to the latter on-dock facility no notice need be given to the Conference Chairman other than the elsewhere required notice of the location of the carrier's "assigned terminal dock"), and (2) each carrier also may have within the entire port terminal area either *one off-dock CY* or *one on-dock CY* where shipper-packed containers are received. Thus the CY authorization is more restrictive than the CFS authorization. The end result is that loose cargo may be received and stuffed into containers either at the off-dock CFS (if any) or at the dock area itself, but *shipper-packed containers may be received only at the single Container Yard in the port terminal area* whether the CY is located in the terminal dock area of whether the CY is located outside that terminal dock area but within the port terminal area.

From the foregoing it is clear that the dispute arises because Tariff Rule 70(B)(1)(a) provided that on and after August 13, 1973, handling charges under Rule 19 would be assessed on *shipper-packed containers* tendered to carrier at his "CY or dock", whereas Tariff Rule No. 19(c)(6) was amended, effective August 13, 1973, to provide that the exemption from paying the handling charge, which exemption theretofore applied to "*cargo*" tendered at CY, CFS or carrier's dock and moving under the provisions of Rule No. 70(B), would thereafter apply only to "cargo" tendered at CFS or carrier's dock and moving under the provisions of Rule No. 70(B). In other words, after August 13, 1973, while Rule No. 70(B) provided that "shipper packed containers" tendered to carrier at CY or dock *would* pay a handling charge, nevertheless, after August 13, 1973, Rule No. 19(c)(6) provided that "cargo" tendered at CFS or carrier's dock *would not* pay the handling charge.

In my opinion, the majority's interpretation does not take into consideration all provisions of the tariff or other relevant factors, including practices in the ports which restrict the areas within the ports to which shipper-packed containers may be tendered. I agree that tariff ambiguities should be resolved in favor of the shipper; nonetheless, the totality of the tariff (*Storage Practices at Longview, Wash.*, 6 F.M.B. 178 (1960) at 182) and all pertinent facts must be considered in arriving at a reasonable interpretation of the tariff (*Thomas G. Crowe* v. *Southern S.S. Co.*, 1 U.S.S.B. 145 (1929) at 147). In the case before us there are other tariff provisions and other facts which negate or at least clarify the ambiguity which seems to result from comparing only Rules Nos. 70B(1)(a) and 19(c)(6).

First there is Tariff Rule No. 70(3) which defines Container Yard as:

> . . . the location designated by carrier in the port terminal area where . . . containers packed with goods *are* received or delivered.

Also Tariff Rule 1(a) contains a provision which permits a carrier to designate locations for the receipt of non-containerized cargo and for the

receipt of shipper-packed containers. That rule specifies that it is the CY "where containers packed with goods may be received".

There is no tariff rule which designates the *dock* as a separate and unique place, separate from the CY, as a place where shipper-packed containers could be recieved. The majority contends, however, that because the dock is mentioned in the cargo handling rules (Rules Nos. 19(c)(6) and 70B(1)(a)) there must be such a place available for delivery of packed containers. If there is not, it is contended, then the tariff is either confusing or fraudulent.

To arrive at such a conclusion requires a reading of only selected tariff rules. When Rules Nos. 19(c)(6) and 70B(1)(a) are read with Rules Nos. 1(a) and 70(3), the reasonable construction is that shipper-packed containers will be received only at the CY and that subsequent to August 13, 1973, there would be a handling charge on such containers.

This interpretation is reinforced by a further reading of the tariff's language. Rule No. 70B(1)(a), in applying the handling charge, refers to "shipper packed containers". Rule No. 19(c)(6) refers to "cargo". That these are two separate and distinct things is evident from the two rules.

Rule No. 19(c)(6), prior to August 13, 1973, exempted three types of *cargo* from the handling charge:

(1) cargo tendered at the CY,
(2) cargo tendered at the CFS,
(3) cargo tendered at the dock,

provided, the *cargo* moved under the provisions of Rule No. 70B.

Cargo moving under the provisions of Rule No. 70B is specifically "cargo packed in containers by the shipper" and moving to certain destinations.

Thus when cargo was in shipper-packed containers, the tariff intended to impose the handling charge as of August 13, 1973, if the container was delivered to the CY or dock. No mention is made in Rule No. 70B(1)(a) of CFS cargo. Consequently, when shipper-packed containers delivered to the CY were deleted from Rule No. 70B(1)(a) as beneficiaries of the handling charge exemption, it was necessarily intended to remove the exemption for all shipper-packed containers received. (It must be remembered that no tariff rule authorized delivery of shipper-packed containers elsewhere than to the CY.)

When, however, only *cargo* delivered to the CY was deleted from Rule No. 19(c)(6), the intention was to make clear that cargo (as opposed to shipper-packed containers) would still receive the handling charge exemption when delivered anywhere except at the CY (the CY was solely for shipper-packed container deliveries—not for uncontainerized cargo).

When all the tariff rules are thus read as a unit, the alleged ambiguity disappears.

Also worth noting is Tariff Rule No. 70(5) which provides the tariff definition of "Place of Rest". It means "that location of the floor, *dock*,

platform or doorway *at CFS or carrier's dock at which cargo is first delivered* by shipper . . ."(Emphasis added). The term "dock" is clearly used in two different ways: first, in connection with cargo delivered to the CFS (non-containerized) and, second, in connection with the place where cargo not sent to the CFS is delivered. No mention is made of the CY. Add this to the fact that the longshore labor union will not permit truck delivery of cargo or shipper-packed containers to the "dock" at ship's side.[5] The only reasonable construction is that the term "dock" here and elsewhere, when used in connection with shipper-packed containers, refers to the CY. Thus when Rules Nos. 70B(1)(a) and 19(c)(6) were amended the intention and result was to remove shipper-packed containers delivered anywhere from the handling charge exemption.

I would deny reparations.

(S) JOSEPH C. POLKING,
Acting Secretary.

[5] Exhibit 1B, page 4.

FEDERAL MARITIME COMMISSION

DOCKET NO. 74-18

DOW CHEMICAL INTERNATIONAL, INC.

v.

AMERICAN PRESIDENT LINES, LTD., ET AL.

ORDER

This proceeding having been initiated by the Federal Maritime Commission upon complaint, and the Commission having fully considered the matter, and having this date made and entered of record a Report containing its findings and conclusions thereon, which Report is hereby referred to and made a part hereof:

IT IS ORDERED, That, pursuant to sections 18 and 22 of the Shipping Act, 1916, each of the following Respondents shall pay to Dow Chemical International, Inc. the sums identified immediately to the right of their names.

American President Lines, Ltd.	$9,841.79
Barber Lines, A/S	249.90
Pacific Far East Lines, Inc.	780.94
Sea-Land Service, Inc.	8,313.63
United States Lines, Inc.	71.40
Zim Israel Navigation Company, Ltd.	428.40
Kawasaki Kisen Kaisha, Ltd.	357.00
Showa Shipping Company, Ltd.	145.93
States Steamship Company	249.44

IT IS FURTHER ORDERED, That Respondents shall comply with the first ordering paragraph hereof on or before the 30th day after the date of this Order; and shall, within five days after compliance, notify the Secretary of the Commission of the date and manner of compliance.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

[46 CFR Chapter IV]
DOCKET NO. 73-5

SECTION 15 AGREEMENTS UNDER THE SHIPPING ACT, 1916

ORDER OF DISCONTINUANCE

February 24, 1977

This proceeding was instituted by notice of proposed rulemaking published February 23, 1973 (38 F.R. 4982). The proposed rules were designed to codify in one rule the various general provisions regarding section 15 agreements, and to set forth certain additional requirements including justification of agreements, time for filing of extensions of agreements, signatories of agreements and other provisions. Certain comments were received but upon request of interested persons the proceeding was postponed by the Commission to permit further consideration of the nature the proposed rules should take.

Since the postponement of this proceeding, time and events to a great extent have overtaken the original proposals. Recent Commission expressions and determinations regarding processing of section 15 agreements have negated the necessity or desirability of continuation of this proceeding in its present form. The more efficient procedure would be to fashion new proposed rules for further comment.

Accordingly, it is ordered that proceedings in this matter are hereby discontinued.

By the commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-51

PERRY'S CRANE SERVICE, INC.

v.

PORT OF HOUSTON AUTHORITY OF HARRIS COUNTY, TEXAS

PARTIAL ADOPTION OF INITIAL DECISION

February 25, 1977

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Ashton C. Barrett and James V. Day, *Commissioners*)[1]

This proceeding was commenced with the filing of a complaint by Perry's Crane Service (Perry) against the Port of Houston Authority of Harris County, Texas (Houston) alleging that Houston has been engaging in certain practices in connection with the rental of heavy crane equipment which violate sections 16, 17, and 18 of the Shipping Act, 1916. (46 U.S.C. 815, 816, 817).[2]

The essence of the complaint is that certain tariff rules and related practices which give Houston's cranes first priority on jobs, even to the extent of displacing Perry's and other private crane owners equipment already working, are unduly and unreasonably preferential and unjust. Complainant is seeking a revision of tariff rules and related practices as well as reparation for the alleged violations.

In his Initial Decision, Administrative Law Judge Norman D. Kline concluded that:

(1) Houston's "first call" and "bumping" practices violate sections 16, First and 17 of the Shipping Act, 1916 (the Act) not only as applied against private crane operators such as Perry, but also with regard to stevedores hiring private cranes.

(2) Houston is entitled to a reasonable preference as to its own cranes and may retain "first call" privileges provided it can timely firnish a crane equally suited for the job. Houston may also retain its "bumping"

[1] Commissioner Bob Casey not participating.

[2] At the outset of the hearing, with the agreement of counsel, the Presiding Officer clarified the scope of the complaint to encompass only alleged violations of section 16, First and the second paragraph of section 17 of the Act.

privilege provided that it can furnish a more suitable crane for the job than that provided by the private crane owner.

(3) While "complainant has clearly suffered some financial injury because of respondent's practices," no reparation can be awarded on the record because of sketchy and confusing evidence as to the amount of reparation due Perry. The matter is remanded for further development.

Exceptions were filed by both Houston and Perry's Crane Service. Oral argument was requested by Houston but denied by the Commission.

Perry's only exception is to the conclusion of the Presiding Officer that Houston is entitled to a limited "first call" on crane work and a "bumping" privilege. It is contended by Complainant that all preferences accorded Respondent should be struck down as being in violation of sections 16 and 17 of the Shipping Act. 1916.

Houston, on the other hand, raises some thirty exceptions to the Initial Decision. For the most part, these exceptions constitute essentially rearguments of contentions already advanced before the Presiding Officer and rejected by him.

Upon review of the record, including arguments of counsel on brief and on exception, we find that the Initial Decision of the Presiding Officer is, except to the extent discussed below, well-founded and supported by the evidence. Accordingly, that decision is adopted except as modified herein.

Houston's exceptions go primarily to the emphasis placed on certain of the evidence by the Presiding Officer. Contrary to the findings made in the Initial Decision, Houston believes that the weight of the evidence favors it rather than Complainant. We disagree. Our review of the record supports the conclusions reached by the Presiding Officer. The testimony of Perry, other private crane owners, and stevedores who utilize crane equipment clearly establishes that Houston's practices result in a disruption to the proper handling of ships and an increase in expenses to stevedores as well as to private crane owners. The record indicates that Houston has unjustly preferred itself to private crane owners and subjected stevedores hiring private crane owners to "bumping" and other unreasonable practices while exempting stevedores who own their own cranes from such practices, all in violation of sections 16, First and 17 of the Act.

Houston argues that its practices have had little effect on Perry's operations and that Perry failed to show that the tariff provisions were the proximate cause of its injury. Houston attributes Perry's present financial plight to a lack of business acumen and a decline in total crane hours worked at Houston's facilities. While these factors may have had some bearing on Perry's declining revenues, the fact remains that Houston's restrictive practices did directly result in a loss of revenue in the fifteen documented instances where a Houston crane "bumped" a Perry crane. Thus, there is sufficient evience to show that Houston's practices were the proximate cause of Perry's injury.

We find little merit in Houston's challenge to the Presiding Officer's

"mini-monopoly" characterization of Houston's operations. As used in the Initial Decision, the term refers to the ability of Houston to exclude competition from *particular* jobs. The Presiding Officer found that the type of "restraint on competition here is not blatantly monopolistic or exclusive in terms of driving private crane owners out of the market," and that Houston, as a practical matter, "could not and does not wish to exclude all private competition from its facilities." However, as the Presiding Officer points out:

> . . . this limited mini-monopoly aspect of the first call, 'bumping' system should not be overlooked. It too runs counter to our national philosophy favoring free and open competition. Furthermore, even it if does not have to be justified with the same quantum of proof necessary in case involving completely exclusive and monopolistic privileges and practices, the lesser deree of an invasion of a national philosophy should nevertheless require justification albeit less stringent. (Cases omitted)

The Presiding Officer then goes on to describe how and why Houston's practices have made serious inroads upon the national philosophy favoring free and open competition. We agree with the findings of the Presiding Officer in this regard.

Houston is disturbed that the Presiding Officer allegedly did not confine himself to the facts in the complaint case but rather strayed into areas not relevant to the subject proceeding and "strains to bring within its ambit a class of persons neither parties hereto nor represented herein, as it if were a decision in an investigatory proceeding pursuant to Commission order." Houston argues that the Presiding Officer went beyond his authority in finding that Houston's practices are undue and unreasonable within the meaning of sections 16, First and 17 with regard to stevedores hiring private cranes. We fail to see the relevance or significance of this challenge to the Initial Decision. The evidence presented related directly to the operation of mobile cranes in and around Houston's facilities. While it is true that the complaint was brought by a private crane owner, the tariff provisions have a direct effect on stevedores utilizing these private cranes. It is the stevedore who goes out and hires the private crane and it is the stevedore who must notify the crane owner that he has been replaced by a Houston crane. The tariff provisions directly affect the stevedores' expenses in connection with the loading and unloading of vessels at the port and, to this extent, they have an impact on the ability of a stevedore who is subjected to these practices to compete with stevedores who are not so subject by virtue of the fact that they own their own cranes.

Finally, Houston takes issue with the Presiding Officer's remand of the proceeding to determine the amount of reparation due. Perry did attempt to offer evidence and proof of damage during the hearings. However, as the Presiding Officer found, such proof was "sketchy in general" and it was difficult to determine whether reparations were due in numerous "bumping" incidences. Further, certain of the claims for reparation are timed-barred by the two-year limitation of section 22 of the Act.

We agree with the Presiding Officer that Complainant is entitled to some degree of monetary restitution for losses occasioned by the unlawful practices of Houston. The extent of reparation cannot be determined on this record. A remand on that issue is accordingly in order. This procedure has been followed by the Commission in instances like the present when the record is full and complete on the issue of violation but is inadequate on the issue of damages. See *Pittston Stevedoring Corp. v. New Haven Terminal Inc.*, 13 F.M.C. 33, 34, 35 (1969); *Charles Salvesen and Company, Ltd. v. West Michigan Dock and Market Corporation*, 12 F.M.C. 135, 148 (1968). The parties should follow the procedures set forth in Commission Rule 15(b) which may avoid the necessity of further hearing.

The Presiding Officer found that Houston's current practices with respect to "first call" and "bumping" violated sections 16, First and 17 of the Act. Accordingly, he ordered Respondent to terminate these unreasonable practices and modify its activities to conform to the guidelines set forth by him in his Initial Decision. In this regard, he found that inasmuch as all preferences or advantages are not necessarily unlawful, and in consideration of Houston's peculiar situation, he would allow Houston some preference with respect to "first call" and "bumping" privileges.

We agree with the Presiding Officer that prior to the start of any job a stevedore should determine the availability of Houston's cranes and if there is one equally suitable for the job at hand then Houston should be given a preference as to furnishing a crane for that job.

Our basis for allowing a limited preference is similar to that advanced by the Presiding Officer; namely, Houston's heavy investment in cranes and extensive labor-related expenses and guarantees; declining share of available crane work; the flexibility of private cranes in moving from one location to another—an option not open to Houston; the fact that private crane owners are using facilities constructed and paid for by Houston to conduct their own private business; and the absence of any evidence that Houston is attempting to monopolize the crane rental business on its facilities.

The key determination to be made here is whether the granting of any "first call" privilege to Houston results in any *undue* or *unreasonable* preferential or prejudicial treatment. Houston's existing "first call" privilege is unlawful and the Presiding Officer correctly and properly so concluded. The Presiding Officer's modification of this privilege significantly limits Houston's preference and, in our opinion, results in a practice which, while still preferential, is no longer undue or unreasonable.[3] As we noted in *A. P. St. Philip, Inc. v. The Atlantic Land Improvement Company, et al.*, 13 F.M.C. 166 (1969), "Section 16 does

[3] In so finding, we specifically deny Complainant's motion of December 3, 1976 that, in the absence of replies to exceptions by Houston, Complainant's exceptions "should be in all things granted" and the Initial Decision expanded to eliminate all "first call" work privileges.

not forbid all preferential or prejudicial treatment; only that which is undue or unreasonable." (p. 174)

There is no evidence that Houston is attempting to monopolize crane operations and give itself an exclusive right to rent cranes on its facilities. Indeed, the record indicates the contrary and those cases cited by Complainant dealing with *exclusive* rights are, for the most part, inapplicable to the facts in this proceeding.

The "first call" privilege, as modified, will require stevedores to select a Houston crane *only* if that crane is "suitable for the job in the judgment of the stevedore in terms of size and expense as any available crane" (p. 23, Initial Decision). While there are other factors involved in selecting a crane, the stevedores emphasized that the size and expense of a particular crane were critical elements in its selection. In addition, a stevedore will be able to hire a private crane at the outset of a job if Houston cannot assure that a suitable crane will be available for the job. In view of the fact that Houston owns only 13 of the available 37 cranes used on Houston's facilities, the stevedores can be expected to utilize private cranes to a significant degree even with the limited "first call" preference we are allowing Houston.

However, assuming the unavailability of a Houston crane and the election by a stevedore to utilize a private crane for a particular job, that private crane operator should be permitted to perform the job to completion without "bumping" by a Houston crane, subject of course to the right of the stevedore to dismiss the private crane for failure to perform the job in a competent manner. Any continuation of "bumping" rights even as modified by the Presiding Officer would continue the practices found to be unlawful in this proceeding.

The record clearly shows that it is the "bumping" feature of Respondent's operations which generates the most concern among the private crane owners and stevedores. The practice of "bumping" which necessitates the removal of a crane already working results in the greatest disruption and expense to the stevedore and/or the private crane owner. While there is evidence in the record that total elimination of all priority rights for Houston might place Houston's crane business in a non-profitable situation, elimination of "bumping," by itself, would have little effect on Houston's financial position. In addition, the Presiding Officer found that "bumping" results in discriminatory treatment between those stevedores owning their own cranes who are not subject to "bumping" and stevedores who must hire private cranes. Even as modified by the Presiding Officer, the "bumping" privilege would still result in disadvantage to stevedores who must hire cranes. Private crane renters would, of course necessarily continue to suffer as a result of the "bumping" practice.

Therefore, while there is support in the record for allowing a limited "first call" privilege to Houston, the practice of "bumping" cannot be justified even as modified by the Presiding Officer. In view of this, we are

vacating that portion of the Initial Decision which provides for the continuation of the "bumping" practice.

With the one exception discussed, we find that the Presiding Officer's findings and conclusions are proper and well-founded and we are accordingly adopting the Initial Decision as modified herein. The proceeding is remanded to determine the amount of reparations due Complainant.

THEREFORE, IT IS ORDERED, That the Initial Decision is adopted in its entirety except that portion of the Initial Decision which allows for the continuation of "bumping".

IT IS FURTHER ORDERED, That Houston shall immediately cease and desist from those practices found unlawful in this proceeding and shall, within 30 days of the date of this Adoption, file appropriate tariff amendments.

FINALLY, IT IS ORDERED, That this proceeding be remanded to determine the amount of reparations due Complainant.

Vice Chairman Clarence Morse, concurring and dissenting.

I concur in the majority report insofar as it finds "bumping" is an unlawful practice and remands the issue of reparations.[4] I dissent from the finding that the preference for Respondent's cranes is permissible or lawful for Respondent when holding its terminal facilities out to be public and open.[5]

The Administrative Law Judge made a thorough and well reasoned analysis of the preference issue. Nevertheless, he and the majority conclude that despite existing law, the preference here allowed Respondent is lawful. I disagree.

The Administrative Law Judge set forth the role of the stevedore in

[4] Such remand is consistent with 46 C.F.R. 502.251 and .252.

[5] A brief discussion indicating the basic methods and arrangements for owning, leasing, and operating terminals may be helpful.

Terminals are owned either privately (i.e., by individuals or by corporations, and irrespective of whether stock ownership in the corporation is closely held or widely held) or municipally (i.e., by state or local government authority or subdivision thereof). In the instant case the ownership of the terminal is municipal—the Port of Houston Authority.

Terminals hold themselves out as proprietary terminals (serving mainly tramp ships and the needs of the terminal operator and not open to use by common carriers or by the public) or as public terminals which service common carriers by water. In this sense the terminal under consideration is public.

In turn, a terminal serving common carriers by water may be open (in that the operator holds itself out to serve any and all common carriers who, in turn, may employ any stevedoring company of its choice to service its vessel) or it may be closed (a terminal which is owned by or leased or preferentially assigned to a terminal operating company which frequently has its own stevedoring operation and holds itself out to provide full terminal and stevedoring services and facilities to its common carrier customers, often on an agreed contract basis). In this sense the terminal under consideration is open.

In those instances where a closed terminal, as here defined, is lawful, the operator is frequently a cargo liner/common carrier company which has sufficient frequency of vessel calls and volume of cargo to be carried as to require full utilization of the terminal to meet its own requirements. The other type of closed terminal exists where a terminal operating company leases the terminal for the purpose of holding itself out to provide, usually, both terminal and stevedoring services to common carriers either on a contract basis or on a tariff basis. In either of these two instances just mentioned there would be other terminal facilities within the port where terminal operators hold themselves out to provide terminal services on an open basis to any and all common carriers by water to the end that common carriers have a full choice as between closed terminals and open terminals and a monopoly of terminal facilities does not exist.

A terminal may be operated by or for the owner, or it may be operated by a terminal operating company for its, the operating company's, own account. Here, the Port of Houston Authority operates the terminal for its own account.

ocean commerce, the need for the vessel operator to have freedom in stevedore selection, and the necessity for open competition in stevedoring. In connection with each of these aspects of the preference issue, the Administrative Law Judge analyzed and applied Commission and judicial precedent, notably *Greater Baton Rouge Port Commission* v. *United States*, 287 F. 2d 86 (5th Cir. 1961); *A. P. St. Philip, Inc.* v. *The Atlantic Land & Improvement Company, et al.*, 13 F.M.C. 166 (1969); and *California Stevedore & Ballast Co.* v. *Stockton Port District*, 7 F.M.C. 75 (1962). It is then concluded, and I agree, that artificial restraints on terminal-related and stevedoring activities are fundamentally and inherently improper either in the vessel's free right of selection of a stevedore or in the stevedore's free right of selection or proper equipment.

Then, however, the Administrative Law Judge and the majority find that in this case precedent need not be followed.[6] Yet nowhere do they find facts in this case or cite legal authority which warrants the setting aside of established principles of prior cases.

Heretofore this Commission has held various exclusive or preferential or unfair arrangements of public terminals to be unlawful under section 16 First and/or section 17, Shipping Act, 1916:

A. P. St. Philip, Inc. v. *The Atlantic Land & Improvement Co., supra,* access of vessel to the terminal conditioned on utilization by vessel of a tug operator favored by the public (non-proprietary) terminal operator.

California Stevedore & Ballast Co. v. *Stockton Port District, supra,* exclusive right in favored stevedoring company to provide all stevedoring services at the public (non-proprietary) terminal.

Greater Baton Rouge Port Commission v. *United States, supra,* stevedoring provided exclusively by operator of public (non-proprietary) terminal to the total exclusion of competing stevedores.

California Stevedore & Ballast Co. et al. v. *Stockton Elevators, Inc.;* 8 F.M.C. 97 (1964), a public terminal (non-proprietary) may not assess one stevedore a charge for rental of terminal-provided equipment and not assess a like charge against a favored stvedore.

Respondent's right of first refusal on crane rentals is clearly a monopolistic practice. Respondent's self-preference is either lawful or not. It is not legitimatized by the fact that Respondent is a public body. The Administrative Law Judge correctly disposed of that issue, citing *United States* v. *California*, 297 U.S. 175 (1936). The self-preference granted here is also not rendered proper by making it a somewhat narrower preference than that now stated in Respondent's tariff. That Respondent has a large investment in cranes is not controlling, and yet that is a basic justification offered. The Commission's mandate is not to guarantee that every capital investment will be recouped. Rather the Commission should ensure only that terminals subject to its jurisdiction

[6] *AT&SF R Co.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973) recognizes the Commission's power to change policy, but nevertheless mandates that it is "the agency's duty to explain its departure from prior norms".

neither unduly or unreasonably prefer themselves nor adopt unjust or unreasonable regulations or practices.

The arrangement here—free right of access by all stevedores to the open terminal, coupled with Respondent terminal's right of first refusal in the renting of cranes when their rental is required by the stevedore—is analogous to tying arrangements under antitrust laws. Tying arrangements are frequently treated as per se violations of section 1 of the Sherman Act on reasoning similar to that used in price-fixing cases. In all events, "Tying arrangements serve hardly any purpose beyond the suppression of competition", *Standard Oil Co. of California* v. *U.S.*, 337 U.S. 293, 305–506 (1949). As stated by the Court in *U.S.* v. *Loews Inc.*, 371 U.S. 38, 44–45 (1962), "[Tying arrangements] are a concern for two reasons—they may force buyers into giving up the purchase of substitutes for the tied product (citations) and they may destroy the free access of competing suppliers of the tied product to the consuming market."

The tying arrangement involved here—the Port of Houston Authority's right of first refusal when a stevedore needs to rent a crane—suppresses competition by Complainant, denies Complainant access to the market for crane rental, denies to the stevedore access to rental cranes from persons other than Respondent, and discriminates as between stevedores who own their own cranes and stevedores who do not in that stevedore/owners can select and use their own cranes whereas stevedore/nonowners are compelled to select and use Respondent's cranes. By analogy, if a tying device is unlawful under the Sherman Act the similar self-preferring device used here is prima facie unreasonable and unlawful.

It is to be noted, of course, that the self-preference provision compels the stevedore to rent Respondent's crane, whereas the stevedore may prefer Complainant's crane because the latter, even assuming the same lift capacity, may be easier to operate, may have a greater operating radius, may be newer, may be better maintained, may function more rapidly, may be safer in use, may have more favorable payment (credit) arrangements, etc., etc., etc. But whether Complainant's crane is or is not superior is not the basic issue. The basic issue here is whether Respondent can lawfully claim self-preference—the right of first refusal on crane rentals.

A terminal operator which provides cranes for rental must adopt just and reasonable rules governing their rental and utilization. *California Stevedore & Ballast Co. et al.* v. *Stockton Elevators, Inc., supra,* 8 F.M.C. at 103. Granting itself self-preference (or the right of first refusal) ro provide rental cranes is prima facie unjust and unreasonable, and the burden of sustaining such practices as being just and reasonable is a heavy one. Respondent has totally failed to sustain this burden.

To justify approving the right of first refusal (the self-preference provision) Respondent relies upon the fact that the Respondent (1) is a state agency and therefore is not governed by the Shipping Act, 1916, (2) has a big investment in these rental cranes and requires self-preference in

order to amortize the cost of the cranes, (3) is a terminal whose cranes may be used only upon its own premises, (4) has less than its fair share of the crane rental market, and (5) employs 16 crane operators who are guaranteed 60 hours straight-time pay per two-week pay period and also employs 16 mechanics and maintenance men.

Point (1)—the state agency exemption—has been demolished. *United States* v. *California, supra.* Point (2) is applicable to every commercial enterprise. If Respondent's commercial needs are the test then every self-preferential, unduly restrictive, or monopolistic tariff rule must nevertheless be found to be lawful on a simple showing that the terminal requires the self-preferences to enable it to pay its debts. Respondent was not compelled to buy cranes. There is no evidence that the vacuum—absence of cranes—would not have been filled by equipment rental firms. Respondent took an ordinary and calculated business risk in acquiring cranes, and we should not "pull its chestnuts from the fire" at the expense of Complainant or the public. Complainant itself has an investment in cranes (perhaps as to Complainant relatively greater than Respondent's investment in cranes is to Respondent) which is not "protected" by any self-preference provision such as that being asserted by Respondent, and yet both—Complainant and Respondent—voluntarily entered the crane rental business expecting to do business on a fair and equal competitive footing. Point (3) lends no support to Respondent, for it must have known before it bought its cranes that they could not be rented for use off-terminal (if, in fact, that prohibition exists at all). As to Point (4), the fact it has but 23% of crane rental business in 1976 establishes nothing. The Administrative Law Judge found that Respondent's crane usage (rental) dropped from 60% of total crane usage on Respondent's facility in 1971 to 26% in 1975 and to about 23% in the first quarter of 1976. Further, the total crane hours worked on the facilities in 1975 was 82% of the hours worked in 1974. This indicates to me that 1974 was, relatively, a boom year for the terminal as it was for world-wide trade. The Administrative Law Judge also found that in 1975 Respondent's cranes worked only 75% of the hours they had worked in 1974, whereas privately-owned cranes in 1975 worked 85% of the hours they had worked in 1974. The obvious explanation for the fall-off in usage of Respondent's cranes, comparing 1975 with 1974, is twofold; one, a decline in aggregate cargo movement in 1975 as compared to 1974, and second, and most revealing, is the Administrative Law Judge's finding Number 28 that:

> 28. There has been an increase in the number of stevedoring concerns purchasing cranes for use on vessels. This has had an appreciable effect on Respondent's crane rental operations in terms of revenues and has also cut into the crane work available for privately owned cranes.

Thus, stevedore-owned cranes are doing a progressively increasing percentage of the crane work at the terminals since Respondent, in 1973, amended its tariff to permit stevedore-owned cranes to have first call for

work on their own vessels and freight-handling activity, and thereby obviously having an adverse effect on the crane rental opportunities of both Complainant and Respondent. In 1962 there were 2 privately-owned cranes, and in 1976, 37 privately-owned cranes in use at the facilities. Respondent's 13 cranes constitute 26% of the total cranes being employed on Respondent's property. As to Point (5)—the fact that Respondent guarantees 60 hours straight-time pay per two-week work period to its 16 crane operators—may be, as to Respondent, an improvident undertaking. But, if so, that is no reason for permitting tariff rules which unfairly prejudice Complainant.

What then are the alleged "justifications" for approving this tariff rule? In the ultimate test it is "MONEY"—not transportation need, not public benefit, not service requirement, no efficiency, not availability, not superiority of equipment. If the need for money is the test, then we are in trouble, for the need for money is pervasive in most business enterprises, and therefore all self-preferences would be lawful.

I am not suggesting that Respondent might not, in proper factual circumstances, hold itself out to operate its terminals, itself, as "closed terminals", doing all the stevedoring on the terminals and itself providing all the required crane services. But it did not attempt to do so. Furthermore, for such conduct to be lawful, there must be other terminal facilities in the port which are open terminals to the end that Respondent would not be maintaining a monopoly on terminal facilities. Thus, in *Agreements Nos. T-2455/T-2553*, 14 SRR 1317 (1974), we held the agreements to be monopolistic and unlawful under sections 15 and 17 of the Shipping Act, 1916, which had the effect of granting Lavino Shipping Co. a monopoly on all modern container terminal facilities in the Port of Philadelphia. Compare *Agreement—Port Canaveral and Luckenbach S.S.*, 17 F.M.C. 286 (1974). In any event, Respondent elected to operate its terminals as "open" terminals, not as "closed" terminals. Having made that election, then stevedores which service the terminals may not be denied the right to utilize any crane facilities of their choosing absent a strong showing by Respondent that its monopolistic tariff rules are just and reasonable. *Calif. S. & B. Co., et al.* v. *Stockton Port District, et al., supra*, 7 F.M.C. at 84; *Pittston Stevedoring Corp.* v. *New Haven Terminal, Inc.*, 13 F.M.C. 33 at 44; *A. P. St. Philip, Inc.* v. *Atlantic Land & Improvement Co. etc., supra*, 13 F.M.C. at 173. Such strong showing was not made herein.

The majority disallows, and properly so, Respondent's "bumping" practice. Such disallowance is, however, inconsistent with approving self-preference to Respondent. If "bumping" is incompatible with the stevedore's right to continue utilizing its chosen equipment, for like reasons the first-call self-preference is incompatible with a stevedore's

right to select at the outset the equipment it thinks best suited to its needs. The two situations are indistinguishable.

(S) JOSEPH C. POLKING,
Acting Secretary.

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

[GENERAL ORDER 22; DOCKET NO. 76-65]

Part 503—Public Information

February 25, 1977

Pursuant to provisions of the "Government in the Sunshine Act" (P.L. 94-409; 5 U.S.C. §552b, September 13, 1976) the Commission published in the *Federal Register* (41 F.R. 55207, December 16, 1976) its proposed regulations implementing that Act. Interested parties were encouraged to submit comments on these proposed regulations. Four such comments were received.*

Of the four parties submitting comments, two objected to the failure of the Act and of the proposed regulations to provide as one ground upon which an interested person may seek closure of a meeting, the likelihood that the meeting will disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential. This Commission can readily understand this objection but is powerless to provide by regulation a procedure not authorized by the statute. The Commission, therefore, is compelled to disregard this objection.

Additionally, one party objected that the proposed regulations provide no opportunity for an interested party to request the Commission to withhold information from public disclosure while the Commission itself may do so. Again, we are powerless to extend the authority of the Act. The Act does not provide for the action of an interested party, as sought by the commenting party. Therefore, we may not so provide by regulation.

The third commenting party addressed our proposed regulations in more detail. This party objected to our description in our statement of policy (§503.70) of these regulations as setting forth "procedural requirements" designed to provide the public with information while maintaining "capabilities" of the Commission in carrying out its responsibilities. The party recommends deletion of the term "procedural." We think such a

*The parties filing comments were: (1) the law firm of Graham and James; (2) Outboard Marine Corporation; (3) law firm of Casey, Lane & Mittendorff; and (4) the Honorable Jack Brooks, M.C., Chairman, House Committee on Government Operations.

change to be unnecessary. We therefore, have not adopted this proposal. This party also urges that "capabilities" is not synonymous with the term "ability" as used in the Declaration of Policy of the Act. We can see no substantive difference between the two words in a statement of policy which would merit modification.

This party recommends changing the definition of "agency" from "Federal Maritime Commission" (§503.71) to "Federal Maritime Commission or a quorum thereof or any subdivision thereof authorized to act on behalf of said Commission." This change it is urged would make the definition consistent with §522b(a)(1) of the Act. We disagree. A quorum of the FMC is not the same as the FMC nor is a quorum of the FMC an "agency . . . headed by a collegial body, . . ." as defined in §522b(a)(1) of the Act. Additionally, we specifically omitted reference to a subdivision of the Commission authorized to act on behalf of the Commission because there is no such entity. Reference to a non-existent entity, we feel, would be confusing and, therefore, unwise.

This party also seeks to have the definition of "information pertaining to a meeting" expanded to include meeting minutes and other information referred to in 5 U.S.C. 552b(f)(1)–(2). We think this evidences a misunderstanding of "information pertaining to a meeting" as used in the Act. The Act describes such information as being capable of exemption from the requirements of subsections (d) and (e) of the Act. Those subsections simply do not apply to the information referred to in 552b(f)(1)–(2).Therefore, in our opinion, "information pertaining to a meeting" refers to that amenable to the provisions of subsections (d) and (e) only.

Additionally the party finds fault in our use in the definition of "meeting" of the words "the deliberations of at least three of the members . . .". This party urges us to adopt the word "majority" instead. This we may not do. The Reorganization Plan 7 of 1961 (75 Stat. 840, April 12, 1961) requires in *all* cases to affirmative vote of not less than three members of the Commission to conduct its business irrespective of the number actually in office. Hence, our use of the word "three" rather than a "majority."

This party also objects to our specific removal in the regulations from the definition of meeting of those items of business determined *seriatim* by members on notation. This is explicitly permitted as discussed in the legislative history of the Act (see Conference Report to accompany S. 5 at p. 11).

This party then suggests two further non-substantive word changes which are of no merit. However, the party does note an omission in our proposed regulations which clearly merits remedy. Section 503.77 of the proposed regulations was meant to provide in the second sentence of paragraph (a) that if, in the opinion of the General Counsel, a meeting or a portion thereof could properly be closed under the Act his certification of such opinion must contain certain information. Unfortunately, as

proposed, the regulation provided: "If, in the opinion of the General Counsel, a portion or portions of a meeting . . . is proper. . . ." As can be seen, we omitted the phrase "the closing of." Therefore, we amend this provision to read: "If, in the opinion of the General Counsel the closing of a portion . . ." etc.

The fourth interested party filing comments was the Honorable Jack Brooks, M.C. in his capacity as chairman of the House Committee on Government Operations on behalf of that Committee. Mr. Brooks had three suggestions to offer.

Mr. Brooks first suggests that sections 503.73 and 503.74 be amended to make clear that there are two separate steps in any determination to close a meeting to public observation. It is noted that the Commission must decide: first, whether or not the meeting fits within one of the exemptions of the Act so as to permit the meeting to be closed; and second, notwithstanding the applicability of an exemption, whether or not the public interest requires that the meeting remain open. It is suggested by Mr. Brooks that the proposed regulations:

> . . . seem to suggest that the Commission need consider the public interest only if it chooses to, whereas the Act contemplates that the public interest issue will be considered in each instance where the Commission determines that a discussion comes within a specific exemption.

We agree with Mr. Brooks' view of the requirements of the Act.

Therefore, we have adopted appropriate modifications to our proposed regulations. We have amended section 503.74 by: (1) adding the following language at the end of paragraph (d) of that section:

> That vote shall determine whether or not any portion or portions of a meeting or portion or portions of a series of meetings may be closed to public observation for any of the reasons provided in section 503.73 of this Subpart, and whether or not the public interest requires that the portion or portions of the meeting or meetings remain open, notwithstanding the applicability of any of the reasons provided in section 503.73 permitting the closing of any portion of any meeting to public observation.

(2) by amending paragraph (e) to read:

> (e) In the case of a vote on a request under this section to close to public observation a portion or portions of a meeting, no such portion or portions of any meeting may be closed unless, *by a vote on the issues described in paragraph (d) of this section*, a majority of the entire membership of the agency shall vote to close such portion or portions of a meeting by recorded vote. [new material italicized]

(3) by amending paragraph (f) to read:

> (f) In the case of a vote on a request under this section to close to public observation a portion or portions of a series of meetings as defined in section 503.71 of this Subpart, no such portion or portions of a series of meetings may be closed unless, *by a vote on the issues described in paragraph (d) of this section*, a majority of the entire membership of the agency shall vote to close such portion or portions of a series of meetings. A determination to close to public observation a portion or portions of a series of meetings may be accomplished by a single vote *on each of the issues described in paragraph (d) of this section*, provided that the vote of each member of the agency shall be recorded and the vote shall be cast by each member and not by proxy vote. [new material italicized]

Further, we have amended section 503.75 by:

(1) amending paragraph (g) thereof by adding the following language at the end thereof:

> That vote shall determine whether or not any portion or portions of a meeting or portion or portions of a series of meetings may be closed to public observation for any of the reasons provided in paragraph (a) of this section, and whether or not the public interest requires that the portion or portions of the meeting or meetings remain open, notwithstanding the applicability of any of the reasons provided in paragraph (a) of this section permitting the closing of any portion of any meeting to public observation.

(2) amending paragraph (h) to read as follows:

> (h) In the case of a vote on a request under this section to close to public observation a portion of a meeting, no such portion of a meeting may be closed under, *by a vote on the issues described in paragraph (g) of this section,* a majority of the entire membership of the agency shall vote to close such portion of a meeting by a recorded vote. [new material italicized]

Mr. Brooks' second suggestion regards alleged inadequacy of our proposed procedures for accomplishing public announcement of forthcoming FMC meetings. Mr. Brooks notes that our proposed regulations (§§503.82 and 503.83) make provision only for public notice, generally, followed by publication in the *Federal Register*. These provisions are alleged to "fall considerably short of the notice envisaged under the Act, which should include publication in publications whose readers may have an interest in the Commission's operations . . ." and the use of mailing lists. We understand the motivation of the Act and the necessity for the widest practicable notification of Commission meetings. Therefore, our regulations were framed in general terms to permit this agency the widest possible latitude to inform the public of its meetings by the most effective means. The Commission fully intends to publish the announcement of forthcoming meetings by appropriate methods in addition to publication in the *Federal Register*. For example, among other possible means of dissemination, notices of pending meetings will be provided in the Commission's public reference room. It has been our experience that trade publications do promptly publish all the information made available by this Commission which is of general interest to their subscribers.

We have not further specified means of dissemination of information because we are of the opinion that the notification policy of the Act will be served more effectively by allowing us flexibility in this area. We wish to stress that we have every intent to fully implement the Act's notification policy by dissemination to the widest possible audience.

Finally, Mr. Brooks objects to the provisions of the proposed regulations regarding certification by the agency's General Counsel as not explicitly providing that such certification will precede the vote of whether or not to close a meeting. Sections 503.74(d) and 503.75(g) implicitly provided for this by stating that the vote of the agency to close a meeting may be taken only "upon consideration of the certified opinion of the General Counsel of the agency provided the members under section

503.77 of the Subpart. . . ." Nonetheless, in the interest of absolute clarity we have amended the first sentence of paragraph (a) of section 503.77 to read:

(a) Upon any request that the agency close a portion or portions of any meeting or any portion or portions of any series of meetings under the provisions of sections 503.74 and 503.75 of this Subpart, the General Counsel of the agency shall certify in writing to the agency, *prior to an agency vote on that request*, whether or not in his or her opinion the closing of any such portion or portions of a meeting or portion or portions of a series of meetings is proper under the provisions of this Subpart and the terms of the Government in the Sunshine Act (5 U.S.C. §552b). [new material italicized]

In addition to the comments of the four interested parties, the Commission has reviewed these proposed regulations *sua sponte*. Our review has unveiled three difficulties which we now take the opportunity to remedy. Mr. Brooks' suggestion regarding the public interest issue in any determination to close a meeting caused us to review our provisions regarding withholding from public disclosure information pertaining to a meeting. In our opinion, the introductory language of the Act providing "Except in a case where the agency finds that the public interest requires otherwise . . ." applies to determinations of whether or not to withhold from public disclosure information pertaining to a meeting as well as to determinations to close a meeting.

We have, therefore, amended section 503.80 to conform to that view. As amended, section 503.80 now requires that the Commission base any determination to withhold information from disclosure on resolution of both whether or not an exception is applicable *and* whether or not, notwithstanding the applicability of an exception, the public interest requires disclosure. In our opinion, this amendment conforms more precisely to the statutory scheme.

Therefore, we have amended section 503.80 by: (1) adding a sentence at the end of paragraph (c) reading as follows:

That vote shall determine whether or not information pertaining to a meeting may be withheld from public disclosure for any of the reasons provided in section 503.79 of this Subpart, and whether or not the public interest requires that the information be disclosed notwithstanding the applicability of any of the reasons provided in section 503.79 of this Subpart permitting the withholding from public disclosure of the information pertaining to a meeting.

(2) amending paragraph (d) to read:

In the case of a vote on a request under this section to withhold from public disclosure information pertaining to a portion or portions of a meeting, no such information shall be withheld from public disclosure unless, *by a vote on the issues described in paragraph* (c) *of this section*, a majority of the entire membership of the agency shall vote to withhold such information by a recorded vote. [new material italicized]; and

(3) amending paragraph (e) to read:

In the case of a vote on a request under this section to withhold information pertaining to a portion or portions of a series of meetings, no such information shall be withheld unless, *by a vote on the issues described in paragraph* (c) *of this section*, a majority of the entire membership of the agency shall vote to withhold such information. A determination to withhold information pertaining to a portion or portions of a series of meetings from public disclosure may be accomplished by a single vote *on the issues described in paragraph* (c) *of this section*, provided that the vote of each member of the agency shall be recorded and the vote shall be cast by each member and not by proxy vote. [new material italicized].

Under the provisions of §503.75 as proposed, at the request of an interested party that a meeting or portion be closed, any agency member, the Managing Director or the General Counsel would request agency action on that proposal. (§503.75(d)). Upon review of the provisions of the Act, we conclude that in such circumstances, only a member of the agency may seek agency action on such a request. Therefore, we have deleted from section 503.75(d) the language: ". . . the Managing Director, or the General Counsel of the agency. . . ."

Additionally, our review of proposed sections 503.86 and 503.87 has revealed wording which might have been confusing if not clarified. Section 503.86(a) originally referred to ". . . all records required to be maintained by the agency under the provisions of section 503.85 of the subpart. . . ." That reference was overbroad. It would have included items to which public access was not contemplated under the Act. To remedy this overbreadth we have amended that sentence to read: "All transcripts, electronic recordings or minutes required to be maintained by the agency under the provisions of section 503.85(a)(3) and (b) of this Subpart. . . ." Hence, for internal consistency we necessarily amended section 503.87(a) to conform to the language of section 503.86 regarding "transcripts, electronic recordings" and "minutes" rather than "records" generally. This revision comports with the wording of the Act which refers only to these specific items. (5 U.S.C. 552b(f)(2)).

All amendments made herein have made these regulations conform precisely to the Government in the Sunshine Act with respect to the activities of the Federal Maritime Commission.

THEREFORE, IT IS ORDERED, That pursuant to the Government in the Sunshine Act (P.L. 94–409; 5 U.S.C. §552b, September 13, 1976), Part 503 of Title 46 C.F.R., is hereby amended by adding a new Subpart H.*

Effective date. These regulations shall be effective as of March 12, 1977.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

*The text of the amendment is reprinted in 46 C.F.R. 503(H).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 502

KOHLER INTERNATIONAL, LTD.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND OF CHARGES

February 22, 1977

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on February 22, 1977.

It is Ordered, That applicant is authorized to refund $453.20 of the charges previously assessed Kohler International, Ltd.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 502 that effective May 1, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from May 1, 1976 through August 25, 1976, the rate to Group 1 Ports on various articles of plumbing fixtures embodied in Items 812 2010 00, 812 2010 20, 812 2020 00, 812 2020 20, 812 3010 00, 812 3010 20, 812 3020 00, 812 3020 20, 812 3030 00 and 812 3030 20 is $47 W/M, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That refund of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 502

KOHLER INTERNATIONAL, LTD.

v.

SEA-LAND SERVICE, INC.

Adopted February 22, 1977

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298) and section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Sea-Land Service, Inc. (Sea-Land or Applicant) has applied for permission to refund a portion of the freight charges on a shipment of plumbing fixtures and parts that moved from New York to Tokyo, Japan, under a Sea-Land bill of lading dated June 30, 1976. The application was filed December 17, 1976.

The subject shipment moved via mini-bridge service under a through rail-water rate published in Sea-Land Tariff No. 234, FMC No. 106 and ICC No. 92. The shipment moved via rail to Oakland, then via Sea-Land from Oakland to Tokyo. Refund of the charges involved here would affect only the ocean carrier's portion. The shipment weighed 27,832 pounds and measured 2,266 cubic feet. The rate applicable at time of shipment was $55 per ton of 40 cubic feet or 2,000 pounds (Sea-Land Freight Tariff No. 234, FMC No. 106, ICC No. 92, Item 812 3020 00, to Group 1 Ports, 2d revised, p. 550–A). The rate sought to be applied is $47 per ton of 40 cubic feet or 2,000 pounds (Sea-Land Freight Tariff No. 234, FMC No. 106, ICC No. 92, Item 812 3020 00, to Group 1 Ports, 3rd revised, p. 550–A).

Aggregate freight charges collected, pursuant to the rate applicable at time of shipment, amounted to $3,115.75. Aggregate freight charges at the rate sought to be applied amount to $2,662.55. The difference sought to

[1] This decision became the decision of the Commission February 22, 1977.
[2] 46 U.S.C. 817, as amended.

be refunded is $453.20. The Applicant is not aware of any other shipments of the same commodity which moved via Sea-Land during the same period of time at the rates involved in this shipment.

Sea-Land offers the following as grounds for granting the application:

(4) A special rate of $47.00W/M had been established in Tariff No. 234, FMC No. 106, on various articles of plumbing fixtures that are shipped by the complainant including, among others the following tariff item numbers:

1st Revised Page 550	Items	812 2010 00
		812 2010 20
		812 2020 00
		812 2020 20
1st Revised Page 550–A	Items	812 3010 00
		812 3010 20
		812 3020 00
		812 3020 20
		812 3030 00
		812 3030 20

The special rates in the above items were established effective September 22, 1975 (Attachment No. 1) to meet all water competition, with an expiration date that was extended to October 31, 1976.

Effective May 1, 1976 a general rate increase was published in Tariff No. 234, following a comparable general increase published in the all-water rates by the Far East Conference. In preparation for it, Sea-Land's trans-Pacific pricing department in Oakland office had decided that the increase would not be applied to any special rates established independently to meet other competitive carriers' rates. Instructions to follow this plan were given to all concerned in teletype message dated January 23 (Attachment No. 2).

Unfortunately, in reissue of the tariff pages to roll in the increase effective May 1, 1976, the above two pages, containing 5 of the separate commodity items of plumbing fixtures, were overlooked in the clerical process. This clerical and administrative error resulted in these items being erroreously increased to $55.00W/M (Attachment No. 3). The complainant had been informed by Sea-Land that the increase would not be applied to any of these special rates.

Complainant made the shipment involved herein on June 30, covered by B/L—F/B 901–817477 (Attachment No. 4). It consisted of articles for which the then applicable rate, erroneously increased, was $55.00 in Item 812 3020. Charges of $3,115.75 were assessed on this rate and paid to Sea-Land by the complainant's freight forwarder. The error in increasing the rate was then discovered and request to correct it made by our Chicago sales personnel in teletype of July 23 to all concerned (Attachment No. 5). The increase in the affected items was removed and the rate to Group 1 Ports restored to $47.00W/M on 4th revised page 550 and 3rd revised page 550–A effective August 25, 1976 (Attachment No. 6).

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by

Public Law 90–298), and Rule 6(b), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the failure to withhold the general rate increase from the special rates, as had been promised to the shipper.

2.Such refund of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to refund a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate on which such refund would be based.

4. The application was filed within one hundred and eighty days from the date of shipment.

Accordingly, permission is granted to Sea-Land Service, Inc., to refund a portion of the freight charges, specifically the amount of $453.20. An appropriate notice will be published in Sea-Land's tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
January 26, 1977.

[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 341(F)

THEFEDERAL MINISTER OF DEFENSE
FEDERALREPUBLIC OF GERMANY

v.

REPUBLIC INTERNATIONAL FORWARDING COMPANY AND REPUBLICVAN AND STORAGE OF LOS ANGELES, INC.

ORDER

March 1, 1977

This proceeding involves a claim for reparation on an alleged overcharge of ocean freight for a shipment of an automobile from California to Germany. The matter was considered by a Settlement Officer who dismissed the complaint. On review, the Commission decided that a proper determination of the matter required evidentiary proceedings. The matter was remanded and referred to an Administrative Law Judge for such proceedings and decision.

Subsequently the parties by joint motion advised that they had resolved their differences and that a settlement was reached whereby Respondent would pay the full amount claimed, subject to receipt of guarantees from the Commission that no civil penalties would be recovered arising from the acts set forth in the complaint.

Administrative Law Judge Thomas W. Reilly, citing case law to the effect that settlements are to be favored, indicated that he would approve the settlement but further indicated that he was not empowered to act on or to bind the Commission on the question of civil penalties. The Presiding Officer therefore granted the motion to dismiss while referring to the Commission the matter of civil penalties.*

In their motion Respondents have asserted that the agreement to make full settlement should not be construed as an admission of any violation of any of the shipping acts. The Presiding Officer, in approving the

*Counsel for Respondents thereupon advised that they would defer implementation of the settlement pending issuance of an order by the Commission approving the settlement embodying all terms thereof including the matter of civil penalties.

settlement, made no specific finding regarding a violation, but advised that:

> . . . repayment of the full amount claimed would restore the total amount paid to that quoted in the original estimate, and that the original estimate was, in all probability, the only amount justified by filed tariffs.

The Presiding Officer conceded, however, that this assumption cannot be conclusively established because of the lack of documentation a diligent search failed to produce.

Nothing has been added to the record since the remand which would shed some light on the transaction, so that even the threshold question of whether we have jurisdiction over the matter cannot be answered with any degree of certainty. Moreover, even assuming jurisdiction, the Commission cannot ratify the Presiding Officer's approval of the settlement in the absence of a specific finding of violation of section 18(b)(3). An agreement to settle a claim for reparation based on an allegation of a violation of section 18(b)(3), can be approved only on an affirmative finding that such violation occurred. See the cases cited in the Presiding Officer's Order of Dismissal, *i.e., Consolidated International Corp. v. Concordia Line,* 14 SRR 1259 (1975) and *Merck, Sharp & Dohme v. Atlantic Lines,* 14 SRR 232 (1974). Here, not only has a violation of section 18(b)(3) not been established by the Presiding Officer but Respondents have specifically advised that the settlement is not to be construed as an admission of any violation on their part.

While the Commission cannot formally approve the stipulation agreement between the parties here, in the absence of a violation of the Shipping Act, 1916, it also finds, for the same reason, no basis to impose any civil penalties. Accordingly, because the parties have apparently resolved their differences to their mutual satisfaction, we see no purpose to be served by their litigating the matters put at issue by the complaint. Under the circumstances, the parties are free to take whatever action they deem necessary to terminate this proceeding.

However, because the Presiding Officer's dismissal of the proceeding is premised on the Commission's approval of a settlement agreement which, under the circumstances, the Commission cannot approve, and because the parties based their request for dismissal upon such approval, the Presiding Officer's ruling dismissing the proceeding must be vacated and the proceeding remanded for whatever action he and the parties deem proper and warranted.

THEREFORE, IT IS ORDERED, That the Presiding Officer's ruling approving the settlement and dismissing the complaint be, and is hereby, vacated;

IT IS FURTHER ORDERED, That the proceeding be remanded to the Administrative Law Judge.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 356(I)

HOBELMANN INTERNATIONAL, INC. FMC 850–R
AGENTS FOR AND ON BEHALF
OF
THE RANSOM & RANDOLPH COMPANY
A DIVISION OF
DENTSPLY INTERNATIONAL, INC.

v.

MOORE-MCCORMACK LINES, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

March 2, 1977

Notice is hereby given that the Commission on March 2, 1977, determined not to review the decision of the settlement officer in this proceeding served February 18, 1977.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 356(I)

HOBELMANN INTERNATIONAL, INC. FMC 850-R
AGENTS FOR AND ON BEHALF
OF
THE RANSOM & RANDOLPH COMPANY
A DIVISION OF
DENTSPLY INTERNATIONAL, INC.

v.

MOORE-MCCORMACK LINES, INC.

Reparation awarded.

DECISION OF JAMES S. ONETO, SETTLEMENT OFFICER[1]

By complaint filed June 30, 1976, Hobelmann International, Inc., a licensed ocean foreign freight forwarder, as agent for Ransom & Randolph Company, a division of Dentsply International, Inc., alleges that charges in excess of those lawfully applicable for transportation in violation of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817, were assessed by respondent Moore-McCormack Lines, Incorporated, a common carrier by water in the foreign commerce of the United States, on a shipment of dental investment on July 3, 1974, from Baltimore to Buenos Aires, Argentina. One thousand, three hundred and fifteen dollars and thirtyfive cents, the amount of the alleged overcharge, is sought as reparation.

The complainant described the shipment on the bill of lading by "the broad commercial description" Dental Investment Multi-Vest, consisting of 231 drums weighing 25,410 pounds or 11,526 kilograms and measuring 632 cubic feet. The shipment was rated on the basis of a Cargo, N.O.S., $125.00 W/M rate[2]. The freight was $2,133.00. The shipment, it is alleged, should have been rated on the basis of a fire ground clay rate at $41.75 W/M[3]. The freight would then have been $817.65.

[1] Both parties having consented to the informal procedure of Rule 19 of the Commission's Rules of Practice and Procedure (46 CFR 502.301-304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof. (Note: Notice of determination not to review March 2, 1977.)

[2] Rate Item 1, Clay, N.O.S. W/M $125.00, Inter-American Freight Conference—Section A Tariff No. 3 (F.M.C. No. 7), From: United States Atlantic And Gulf Ports To: Ports Of Brazil—Uruguay Argentina—Paraguay. 8th. Revised Page 93, Effective date May 10, 1974.

[3] See footnote 13.

The complainant contends that dental investment or Ultra-Vest Jewelry Investment or Ultra-Vest Investment is a powder used to form molds in the investment casting of jewelry or, in the present situation, used in investment casting of dental prosthetic devices. Therefore, complainant argues, it should have been classified as a fire ground clay. The complainant also quotes the statement of Dentsply International, speaking for the Ransom & Randolph Company, manufacturers of Ultra-Vest (Multi-Vest) or dental investment, that the composition of Ultra-Vest is 60% calcined silica; 30% plaster; and 10% control chemicals. The company is further alleged to have stated that dental investment was not the correct description of the material. The correct alternative description is averred to have been either Cement Refractories per Schedule B 662.2230, or Fire Ground Clay per Schedule B 662.3205.

Respondent argues that the material shipped is not classifiable under Export Declaration Schedule B Commodity Numbers. Moreover the claim, as a request for an adjustment of freight charges based on an alleged error in description, should have been presented to the carrier in writing before the shipment left the carrier's custody[4]. Respondent further argues that even the complainant does not seem to know how to describe the commodity. At various times complainant refers to it as casting refractories; clay fire ground; and Ultra-Vest Jewelry Investment. Respondent also notes that the directions for using Ultra-Vest Jewelry Investment make no reference to using fire of heat-furnace or oven equipment and thus do not support the contention that the material is a fire clay or a refractory mix.

Procedurally, section 22 of The Shipping Act, 1916, 46 U.S.C. 821, requires that complaints must be filed within two years from the time the cause of action accrues in order to enter an award of reparation[5]. The cause of action accrues at the time of shipment or payment of the freight, whichever is later[6]. In the situation here presented, the bill of lading is marked "Freight to be Prepaid in USA On Board." The Freight was paid by check dated October 17, 1974. Moreover, it is settled that claims filed within two years of accrual of the cause of action cannot be barred by tariff regulations imposing a shorter time limitation. The Commission has held:

> . . . once a claim has been finally denied by a carrier, the shipper may still seek and in a proper case recover reparation before the Commission at any time within two years of the alleged injury, and this is true whether the claim has been denied by the carrier on the merits or on the basis of a time limitation rule.[7]

The claim therefore has been filed within limitations.

With regard to the burden of proof, it is also settled that the test is

[4] Rule 3. *Claims For Adjustment In Freight Charges*. 4th. Revised Page 20, Effective date June 8, 1974. Aforementioned tariff of rates.

[5] *Reliance Motor Car Co.* v. *G.L.T.C.*, 1 U.S.M.C. 794 (1939).

[6] *Rohm & Haas Co.* v. *Seatrain Lines, Inc.*, 73-51, Order 10/16/73, and *Aleutian Homes, Inc.* v. *Coatwise Line et al.*, 5 F.M.B. 602 (1959).

[7] *Proposed Rule—Time Limit on Filing Overcharge Claims*, 12 F.M.C. 298 (1969).

what the claimant can prove based on all the evidence as to what was actually shipped, even if the actual shipment differed from the bill of lading description. But where the carrier is thereby prevented from verifying the claimant's contentions, the claimant has a heavy burden of proof to establish his claim.[8]. Furthermore, in its Report on Remand[9], the Commission has added:

> In considering claims involving disputes as to the nature of the cargo (either weight, measurement or description), if the cargo has left the custody of the carrier before the claim is brought and the cargo cannot be reexamined, the Commission has traditionally imposed a heavy burden of proof on the complainant. Nothing in the Court's opinion in *Kraft* should change this.

The presentation yields very little that might be relied upon to identify the character of this commodity. However resort to definitions and usage offer an insight into the nature of this material.

Refractory material is defined as that which is capable of enduring high temperature such as clay, brick, or mortar. Again refractory material is more particularly described as any of various non-metallic ceramic substances that are characterized especially by their suitability for use as structural materials at high temperatures usually in contact with metals, slags, glass, or other corrosive materials (as in furnaces, crucibles, or saggers) that are classified chemically as acid (as silica and fireclay), basic (as magnesite and dolomite), or neutral (as high-alumina refractories, carbon, and silicon carbide), and that are produced in the form of brick, castable concretes, plastics, and granular materials in bulk[10].

Investment casting is described as the method used for reproducing faithfully delicate and intricate detail. Briefly two techniques are traditionally used. The lost wax and the sand process methods. In the sand process, which is involved here, the mold is made by applying to the pattern a very fine damp French sand composed of clay, silica and alumina, which hardens when it dries[11].

The Ransom & Randolph Company apparently has improved the traditional method of applying the sand to the model by the introduction of the use of combined vacuum and vibration which facilitates investment by their product. The company describes Ultra-Vest Investment as a specially blended compound for the jewelry casting industry. It was designed to be mixed with water to give a smooth, easy-to-handle slurry at a very low rise under vacuum. In relevant part the instruction specifies:

> Remove bowl from mixer and place on vacuum table and vacuum until the investment rises in bowl and collapses . . . fill flasks by pouring investment down the side of the flask, allowing the investment to flow up and around and through the patterns . . . Fill flasks with investment to a height which completely covers the top of the patterns. Place invested flasks under vacuum and vacuum for one and a half to two minutes. While

[8] *Western Publishing Co., Inc.* v. *Hapag Lloyd A. G.*, 283(I), 13 SRR 16 (1972).

[9] Docket No. 73-44—*Kraft Foods* v. *Moore-McCormack Lines, Inc.*, 11/24/76, Report on Remand in accordance with the decision of the Court in *Kraft Foods* v. *Federal Maritime Commission*, U.S.App.D.C. , 538 F. 2d 445 (1976).

[10] Webster's Third New International Dictionary, Unabridged, 1967 Edition.

[11] Encyclopaedia Britannica, 1973 Edition.

under vacuum, the flasks should be vibrated to help release air bubbles from the surface of the patterns. This vibration should be continued for a few seconds after the vacuum has been released. This will allow the investment to flow back around the pattern. The flasks are filled to the top and vibrated to level off the investment. The complete investing cycle should take eight to nine minutes.

Combining definitions and usage a description of this commodity may be fashioned. It is concluded that it is a refractory material because it is a non-metallic ceramic substance (60% calcined silica; 30% plaster; and 10% control chemicals), classifiable chemically as an acid (as silica), and produced in the form of a finely ground powder suitable for use in forming molds by investment casting.

This refractory material must next be classified in relation to the specific commodity descriptions existing in the applicable tariff of rates at the time of shipment. The only specific commodity description closely resembled by this shipment is refractory mixes, plastic or castable[12]. There is no rate for "fire ground clay"[13].

Accordingly, reparation in the amount of $1,079.50 is awarded[14].

(S) JAMES S. ONETO,
Settlement Officer.

[12] REFRACTORY MIXES, PLASTIC or CASTABLE and BAFFLE or RAMMING MIXTURES W/M $59.50, Rate Item 22, 26th Revised Page 158, Effective date June 1, 1974.

[13] Fire ground clays or variants thereof as described under Schedule B commodity numbers established by the United States Customs Service are not the commodity descriptions controlling in this matter. It is the commodity description and rate on file with this agency at the time of shipment. The rate for CLAY, FIRE—SEE BRICKS, FIRE, 8th. Revised Page 93, and 10th. Revised Page 84, Effective dates May 10, and June 17, 1974, of the aforementioned tariff of rates is patently inapplicable.

[14] 15.8 × $59.50 =s $940.1. $940.1 + $113.40 Bunker SC ($10/Ton) =s $1,053.50. $2.133.00 − $1,053.50 =s $1,079.50.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 487

U. S. DEPARTMENT OF AGRICULTURE

v.

WATERMAN STEAMSHIP CORPORATION

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

March 2, 1977

No exceptions having been taken to the initial decision in this proceeding, and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on March 2, 1977.

It is Ordered, That applicant is authorized to waive collection of $3,271.26 of the charges previously assessed the U. S. Department of Agriculture.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket 487 that effective February 17, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from February 17, 1976 through August 20, 1976, the 'all inclusive' rate on 'Peanut Oil, In Cans' from New York to Hodeidah is $230.50 W, NSD, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 487

U. S. DEPARTMENT OF AGRICULTURE

v.

WATERMAN STEAMSHIP CORPORATION

Adopted March 2, 1977

Application granted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

Waterman Steamship Corporation seeks permission to waive collection of a portion of the freight charges on a shipment by the Commodity Credit Corporation, United States Department of Agriculture, of one hundred metric tons of Peanut Oil, Refined, in cans, from New York to Hodeiah, Yemen, on March 10, 1976. The rate applicable at the time of shipment was $230.50 per 2,240 pounds, NSD (not subject to discount) plus 12½% Hodeiah congestion surcharge.[2] This rate resulted in aggregate freight charges of $29,441.35. The rate sought to be applied is $230.50 per 2,240 pounds, NSD.[3] This rate would have resulted in total freight charges of $26,170.09. Therefore permission to waive collection of $3,271.26 is requested.

On January 5, 1976, Waterman booked the aforementioned shipment. On January 30, 1976, a 7½% Hodeiah congestion surcharge went into effect. On February 6, 1976, a 12½% Hodeiah congestion surcharge went into effect. On February 17, 1976, Waterman's tariff agent filed a negotiated rate of $230.50 per long ton, NSD, plus 12½% Hodeiah congestion surcharge. Through inadvertence the tariff agent was not informed that the rate was to be all inclusive, i.e., not to include the

[1] This decision became the decision of the Commission March 2, 1977.

[2] Item 4002, *Account U.S. Department of Agriculture*, Contract No. 9264-A—From New York to Hodeiah. Approximately 100 Metric Tons Peanut Oil, in cans. Rate includes Outport Arbitrary, Group I, $230.50 W, NSD. Waterman Steamship Corporation, Tariff No. 18–C, Section V Project Rates Red Sea—Aden. From: U.S. ATLANTIC AND GULF PORTS To: RED SEA, GULF OF SUEZ, AQUABA AND ADEN BASE PORTS. 16th Revised Page 116, Effective February 17, 1976.

[3] (R) Peanut Oil, in Cans, NEW YORK TO HODEIAH, Approximately 103 metric tons. Rate is all inclusive. Rate expires with September 19, 1976, GROUP 2, $230.50 W, NSD. Same Tariff. 10th Revised Page 101–E, Effective (T) August 20, 1976.

12½% Hodeiah congestion surcharge. On March 10, 1976, the cargo was shipped. On August 20, 1976, an all inclusive rate of $230.50 per long ton NSD went into effect.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications,* Rules of Practice and procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[4] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[5] states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

It is therefore found that:

1. There was an error due to inadvertence in failing to file a new rate.
2. Such waiver of collection of a portion of the freight charges will not result in discrimination among shippers.
3. Prior to applying for authority to waive collection of a portion of the freight charges, Waterman filed a new tariff which sets forth the rate on which such waiver would be based.

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[4] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

[5] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges,* under *Purpose of the Bill.*

4. The application was filed within one hundred and eighty days from the date of shipment.

Accordingly permission is granted to Waterman Steamship Corporation to waive collection of a portion of the freight charges, represented by $3,271.26.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
February 1, 1977.

FEDERAL MARITIME COMMISSION

No. 75-53

REFRIGERATED EXPRESS LINES (A/ASIA) PTY., LTD., ET AL.

v.

COLUMBUS LINES, INC., ET AL.

NOTICE OF DETERMINATION NOT TO REVIEW

March 2, 1977

Administrative Law Judge Norman D. Kline served an order of dismissal in this proceeding February 3, 1977. While dismissing the complaint, he expressed his opinion that some regulatory purpose would be served by litigating the issue relating to past violations of section 15 of the Shipping Act. He acknowledged that it is the Commission that would make this determination.

Notice is hereby given that the Commission on March 2, 1977, determined not to review the order of dismissal of the Administrative Law Judge in this proceeding served February 3, 1977. The question of whether or not further proceedings are warranted on the issue of past section 15 violations will be considered apart from this complaint proceeding and need not affect the dismissal.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 75–53

REFRIGERATED EXPRESS LINES (A/ASIA) PTY., LTD., ET AL.

v.

COLUMBUS LINE, INC., ET AL.

DISMISSAL OF COMPLAINT WITH PREJUDICE

February 3, 1977

The respondent carriers in this proceeding, Columbus Line (Columbus),[1] Associated Container Transportation (Australia) Ltd., Australian Shipping Commission (Australian National Line) (ACT/ANL), and Farrell Lines, Inc. (Farrell), have filed a motion seeking dismissal of the complaint with prejudice and without award of costs or attorneys' fees. Complainant Refrigerated Express Lines (A/Asia) Pty. Ltd. (REL) has entered into a stipulation with respondents agreeing with the action requested in the motion. Hearing Counsel have filed a reply to the motion in which they state that they do not oppose the motion on the grounds that the Commission has given its approval to various agreements which have restored the trade to order. Hearing Counsel furthermore state that they do not believe further proceedings are warranted to determine the existence of possible unfiled agreements in the past and that no regulatory purpose would therefore be served by continuance of the proceeding.

The basis for the motion and stipulation is the fact that the parties have apparently settled their differences and have embodied this settlement in a series of agreements which have been filed with and approved by the Commission (Agreement Nos. 10245, 10247, 10248, 10250, 10250(A), and 10260). Some time after the Commission approved these agreements (approval occurring apparently on or about August and September, 1976), complainant and respondents executed a mutual release dated December 16, 1976, as provided by Agreement No. 10250 and the stipulation mentioned above, dated December 17, 1976.

The various agreements cited essentially establish an arrangement by which REL would be permitted to carry meat from ports in Northwestern

[1] Columbus Line is the trade name of Hamburg-Suedamerikanische Dampfschiffahrts-Gesellschaft, Eggert and Amsick.

and Eastern Australia to East Coast and Gulf ports of the United States as a breakbulk carrier from June 1, 1976, at least through the year 1977. REL is furthermore guaranteed a 15 percent allocation of the meat moving from the East Coast of Australia in the subject trade and in return for serving ports in Northwestern Australia will be given a premium of $25 per metric ton to defray costs of handling at those ports funded by contributions of all the lines serving the meat trade. The four respondent lines continue to be designated as the containerized carriers together with another carrier, namely, Trader Navigation Co. Ltd. (Atlantraffik Express Service) which line, however, is limited in its operations. The essentials of these arrangements are contained in Agreement No. 10250, which consists of separate letters from the chairman of the Australian Mean Board to each of the carriers involved together with the acceptances of each carrier. See Exhibit 4 attached to the Motion to Dismiss. The other agreements cited consist of agreements relating to loading, expenses at Northwestern Australian ports, coordination of sailings, the guaranteeing of REL's allocated share and other matters implementing the basic arrangement. The Australian Meat Board apparently plays a role in all of these arrangements, for example, by designating lines as breakbulk or containerized, collecting funds to pay REL the premium for servicing ports in Northwestern Australia, determining the amount of this premium (or "surcharge" as it is sometimes called) and calling the lines to meet with representatives of Australian exporters to arrange schedules and capacities "subject to approval by the appropriate U.S. and Australian authorities."

The above arrangements appear to settle the controversy between REL and the four respondents as well as between REL and the Australian Meat Board.[2] The complaint, as originally filed, alleged that the four respondent carriers entered into a "deal" among themselves and the Meat Board by which the four carriers would enjoy exclusive rights to the carriage of meat from Australia in the subject trade in return for observing maximum freight rates designated by the Board. REL further alleged that meetings were held between members of the Board and respondents following which respondents resigned from the Australia/Eastern USA Shipping Conference (FMC Agreement No. 9450) and filed tariffs simultaneously publishing identical maximum rates resulting in the exclusion of all other carriers from the carriage of meat after January 1, 1976. The complaint alleged that these arrangements demonstrated the implementation of agreements which had not been filed with the Commission for approval, in violation of section 15 of the Shipping Act, 1916 (the Act), and that pursuant to such alleged agreements, respondents had engaged in unlawful discrimination, preference, unfair devices, unfair

[2] REL had also commenced an action in the Australian Industrial Court under the Australian Trade Practices Act against the Australian Meat Board as well as respondents herein. See Ex. 7 (Mutual Relase) attached to the subject motion.

contracts and unreasonable rates, in violation of sections 14 Third and Fourth, 16 First, 17 and 18(b)(5) of the Act.

As shown by the agreements cited above, complainant REL has successfully negotiated a satisfactory resolution of its controversy, apparently resuming the carriage of meat under the terms and conditions arranged. The law and Commission rules of course, encourage settlements and engage in every presumption that such settlements are valid and lawful. *Consolidated International Corporation v. Concordia Line*, 14 SRR 1259, 1261 (1975), *Merck, Sharp & Dohme International a Division of Merck & Company, Inc. v. Atlantic Lines*, 14 SRR 232, 235, (1974), Rule 6(a), 46 CFR 502.91, Rule 6(d), 46 CFR 502.94(a)(1). This does not mean that the Commission must act as a rubber stamp in evaluating settlements especially when the settlements themselves require approval under section 15 of the Act. *Consolidated International Corporation v. Concordia Line*, cited above, *Massachusetts Port Authority v. Container Marine Lines, et al.*, 11 SRR 37, 40 (1969), *American Export Isbrandtsen Lines, Inc.*, 14 F.M.C. 82, 89 (1970), *Delaware River Port Authority et al. v. Puerto Rico Maritime Shipping Authority*, 14 SRR 1509, 1510 (1975). However, in this instance the Commission has evaluated the terms of the settlements and given its approval. Therefore the private controversy between REL and respondents can be deemed terminated and the complaint ought to be dismissed with prejudice as requested. It is so ordered. Before terminating all discussion, however, a few matters bear consideration relating to the remarks of Hearing Counsel in their reply to the subject motion.

As mentioned, Hearing Counsel stated that further proceedings would not be warranted to determine whether there had been a violation of section 15 because of the alleged failure to file agreements for approval in the past. Complainant, as mentioned, had alleged not only that it had suffered various types of harm stemming from alleged discrimination, prejudice, etc., but that respondents had entered into agreements which had not been filed with nor approved by the Commission. REL, furthermore, proffered evidentiary material and cited facts which are officially noticeable such as respondents' simultaneous resignations from the existing conference and tariff rulings showing similar rates on meat. See Preliminary Findings of Fact and Related Rulings, December 16, 1975; Requests in the Nature of Motions for Summary Judgment and Motions to Dismiss Denied, April 27, 1976, pp. 7–9. The record had reached a stage of evidentiary development so as to convince not only REL but Hearing Counsel to ask me to issue an initial decision finding respondents in violation of section 15 not only for failure to file but for carrying out agreements to monopolize the importation of Australian meat into the East Coast of the United States in return for maintaining fixed maximum rates. See Hearing Counsel's Opening Memorandum and

Proposed Findings of Fact, February 24, 1976, and Reply Memorandum and Reply to Motion to Dismiss, March 16, 1976.[3]

Notwithstanding these requests of Hearing Counsel and REL, I refused to issue an initial decision in the nature of a summary judgment which would have found respondents in violation of section 15 primarily because of factual denials by respondents and the need for full hearings with opportunity for cross-examination to test complainant's as well as respondents' evidence. See Requests in the Nature of Motions for Summary Judgment and Motions to Dismiss Denied, cited above, pp. 12–15. Subsequent appeals from my rulings were not pursued and negotiations for settlement which reached a successful conclusion have, of course, eliminated any incentive on REL's part to prosecute its complaint. Hearing Counsel have no apparent interest in pursuing the matter of past violations and conclude that under all the circumstances "no regulatory purpose would be served by further proceedings."

I have no problem in ordering dismissal of the complaint with prejudice as requested by the parties.[4] I do not believe, however, that I can agree with Hearing Counsel that no further proceedings are warranted and that no regulatory purpose would be served by further proceedings. Although complainant has settled its differences with respondents, the complaint raised issues which go beyond the confines of a private controversy and alleged, in effect, that a public wrong had been done. If, in fact, the record, if fully developed, would show that respondents had failed to file and had executed an anticompetive agreement for some period of time during the first several months of 1976 or before, a violation of section 15 of the Act would have occurred and the public interest as well as that of private parties would have been affected. Indeed, it was the public interest in such an issue that prompted Hearing Counsel to petition for leave to intervene in the first place.[5] Furthermore, I know of no doctrine of law that holds that once violators of law have ceased their unlawful practices, no harm has been done and appropriate law enforcement

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[3] On the basis of the record developed as shown in my Preliminary Findings of Fact, cited above, Hearing Counsel stated in their Opening Memorandum that "Hearing Counsel submit that the Administrative Law Judge may find that an agreement exists among the parties respondent as is subject to the filing and approval requirements of section 15." Opening Memorandum, p. 3. Later Hearing Counsel stated: "There exists today in the Australia/U.S. East and Gulf Coast trade a *de facto* conference arrangement involving respondents. . . .," OM, p. 17, and "[b]ased upon all of the above, Hearing Counsel request the Administrative Law Judge to find that an agreement exists among the parties respondents . . . as is subject to the filing and approval requirements of section 15." OM, p. 20. On March 26, 1976, Hearing Counsel concluded: "Moreover, as we urged on Opening Memorandum and by this Reply, there exist compelling reasons for finding the instant agreement subject to section 15 at this stage of the proceeding where the Administrative Law Judge can agree . . . 2. There presently exists a *de facto* conference agreement in defiance of this nation's regulatory laws. We therefore request the Administrative Law Judge to find that the failure to file a memorandum of the agreement is a continuing violation of section 15 of the Shipping Act, 1916." Reply Memorandum, p. 12.

[4] The parties request also that no costs or attorneys' fees be awarded. It is not Commission policy to award such things as reparation except in most unusual circumstances, not present here. See Docket No. 76–5, *Ace Machinery Company v. Hapag-Lloyd Aktiengesellschaft*, Order, October 7, 1976, p. 5; same docket, Order Denying Motion to Vacate, August 4, 1976, p. 5, and cases cited therein.

[5] In their petition for leave to intervene, November 28, 1975, Hearing Counsel had expressed great concern over the possibility that an unapproved section 15 agreement would result in exclusion of three carriers from the trade, "a matter of great public interest." Petition, p. 1.

agencies are relieved of their obligation to enforce the particular law in question. This Commission has instituted investigations on far less provocation than that which exists in the present case.[6]

It is true that administrative or other proceedings have been discontinued when the activities under investigation have terminated and the cases have been deemed moot but there are many cases holding that such proceedings need not be terminated if the type of activity involved is likely to recur, if necessary principles or guidelines would result, if rights of outside parties are involved, if much time and expense in litigation has already been consumed, or for some other valid purpose. See, e.g., *Investigation of Rates in the Hong Kong-United States Atlantic and Gulf Trades*, 11 F.M.C. 168, 173 (1967); Docket No. 75–57, *Matson Navigation Company-Proposed Rate Increase, etc.*, Order on Appeal, January 14, 1977, pp. 6–8; *Southern Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498, 516 (1910); *Walling v. Haile Gold Mines, Inc.*, 136 F. 2d 102, 105 (4th Cir. 1943); *Walling v. Mutual Wholesale Food & Supply Co.*, 141 F. 2d 331, 334–335 (8th Cir. 1944); *Boise City Irr. & Land Co. v. Clark*, 131 Fed. 415 (9th Cir. 1904);; *Rates on U.S. Government Cargoes*, 11 F.M.C. 263, 279 (1967).

The instant case provides an example of an issue that could very likely recur with enormously significant consequences, namely, that concerning the validity of the Act of State and related doctrines, which, if carried to their logical conclusions, would enable regulated carriers to obtain licenses from foreign governments authorizing them to ignore the requirements of the Shipping Act. Although I am convinced that these doctrines have no merit in the regulatory context and have so ruled (see Requests in the Nature of Motions for Summary Judgment and Motions to Dismiss Denied, cited above, pp. 29–42; Leave to Appeal to Commission Granted, May 5, 1976), respondents had vigorously argued that the Commission had been, in effect, ousted from jurisdiction or at least consideration of their past practices because of the participation of the Australian Meat Board. Because of subsequent negotiations, my rulings in this matter never reached the Commission on appeal. Any regulated foreign carrier therefore may resurrect the argument in case it wishes to prevent the Commission from questioning its activities, claiming that its government has ordered the action in question. This is so even though respondents have since filed agreements for approval including participation of the Meat Board, a curious development considering their earlier position that the Meat Board's participation and "ukases" removed all of these matters from the Commission's consideration. The status of Act of State and related defenses is therefore unsettled. Consequently one could argue that

[6] See the discussion below concerning an investigation initiated by the Commission in Docket No. 76–42 following dismissal of the complaint in Docket No. 76–5, the *Ace* case, cited above.

a determination of the validity of these doctrines by the Commission would serve a useful regulatory purpose.[7]

Whether any regulatory purpose would be served by pursuing the issue of past violations of section 15, however, is not for me or Hearing Counsel but for the Commission to determine since only the Commission can institute investigatory proceedings or otherwise instruct its staff to inquire into the matter. In some instances, the Commission has refused to institute investigatory proceedings following settlement of differences between complainant and respondent despite Hearing Counsel's petition that such a proceeding be instituted in order to determine a novel jurisdictional issue. See Docket No. 73–30, *American Warehousemen's Association v. The Port of Portland*, Order, November 11, 1974. In other cases, cited above, the Commission has continued to pursue issues concerning rates long since canceled in order to establish guidelines and to protect the rights of shippers who may wish to file complaints subsequently. See Docket No. 75–57, *Matson Navigation Company, etc.*, Order on Appeal, cited above. In still other instances the Commission has dismissed a complaint which it had found to be frivolous in which a consignee had alleged that a carrier's heavy lift charge on a shipment moving to Chicago, Illinois, in August 1974, was unlawful but apparently as a result of the allegations in the complaint, initiated a separate investigation not only of that carrier's heavy lift charge at Chicago but also similar charges of approximately 10 other carriers for a five-year period covering Atlantic and Great Lakes ports. See Docket No. 76–5, *Ace Machinery Company v. Hapag-Lloyd Aktiengesellschaft*, Order, October 7, 1976; same docket, Order Denying Motion to Vacate, August

[7] If one is seeking other possible regulatory purposes, one could note that Commission determination of issues concerning alleged unapproved, concerted carrier activity may affect rights of other parties under antitrust laws. See *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966). Moreover, Hearing Counsel have themselves argued in other cases that issues ought to be litigated to conclusion even if parties have settled their private differences or rates under investigation have been canceled in order to establish guidelines, protect rights, utilize principles in later cases, or merely to protect the Commission's regulatory function. See, e.g., Docket No. 73–30, *American Warehousemen's Association*, cited below (determine novel jurisdictional issue); Docket No. 75–57, *Matson Navigation Company-Proposed Rate Increase, etc.*, Order on Appeal, January 14, 1977 (protect possible shipper rights to reparation and utilize findings in later case); Docket No. 74–30, *Sea-Land Service, Inc.,—General Increases in Rates in the U.S. West Coast/Puerto Rico Trade*, Hearing Counsel's Exceptions, July 21, 1976, p. 10 (protect Commission's "rate regulatory function"). In Docket No. 75–57, cited above, incidentally, the Commission announced its policy of not discontinuing investigations of canceled rates because the parties "have spent a good deal of time and money in attempting to determine the lawfulness of the rates at issue" and "there is the possibility of reparation actions by shippers pursuant to section 22." Order on Appeal, pp. 6, 7.

Ironically, in Docket No. 74–30, cited above, Hearing Counsel found a regulatory purpose when urging the Commission to continue a proceeding in order to find that rates long since canceled had been just and reasonable on the ground that such action was necessary to protect the Commission's "rate regulatory function" which would be "destroyed" by the carrier's cancelation of the rates under investigation. In the instant case, however, Hearing Counsel apparently see no destruction of the Commission's regulatory function if parties who may have operated concertedly in violation of section 15 and the antitrust laws have ceased doing so and therefore the matter of past violations is not to be pursued by the Commission.

4, 1976, pp. 5, 6;[8] Docket No. 76–42, *Heavy Lift Practices and Charges of Hapag-Lloyd Aktiengesellschaft, The North Atlantic Westbound Freight Association and its Member Lines and Europe Canada Lakes Line (Ernst Russ) in certain United Kingdom Trades*, Order of Investigation and Hearing, August 4, 1976.

CONCLUSIONS

Complainant REL and four respondent carriers have negotiated a successful resolution of their controversy and have obtained Commission approval of all of their agreements embodying this resolution, pursuant to which complainant has executed a release and stipulated that the complaint should be dismissed with prejudice. Hearing Counsel do not oppose dismissal and state furthermore that no further proceedings are warranted to determine whether there had, in fact, been a violation of section 15 as the complaint had alleged.

It is axiomatic that the law favors settlements. In this case, furthermore, the Commission has given its specific approval to the terms and conditions contained in the various documents embodying the settlement. The complaint is therefore dismissed with prejudice and without award of costs or attorney's fees.

I cannot agree with Hearing Counsel's statements that no regulatory purpose would be served by litigating the issue relating to past violations of section 15. A violation of section 15 does not become moot merely because the parties involved have terminated the alleged practices in question. There are numerous cases in which the Commission has continued cases or pursued issues even when they were arguably moot in order to establish guidelines and principles or to protect the rights of outside persons or for other reasons. It is clearly established, however, that it is the Commission and not this judge nor Hearing Counsel which makes the determination as to whether further proceedings are warranted.

(S) NORMAN D. KLINE,
Administrative Law Judge.

[8] If there be any doubt as to the Commission's feelings regarding the fact that it and not the presiding judge decides whether to initiate investigatory proceedings, any such doubt is dispelled by the Commission in the pages cited. In the *Ace* case, although agreeing with the presiding judge that the complaint was frivolous and was correctly dismissed, the Commission took exception to the judge's statement there was no reason for the Commission to launch an investigation upon its own motion and proceeded to launch such an investigation on the basis that the complaint had pleaded "several potential Shipping Act violations. . . ."

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-13

LYKES BROS. STEAMSHIP CO., INC.

v.

FAR EAST CONFERENCE, ET AL.

ORDER ON APPEAL OF DISMISSAL

March 7, 1977

This proceeding arose upon the complaint of Lykes Bros. Steamship Co., Inc. (Lykes), which alleged that the Far East Conference's condonation of westbound mini-land bridge (minibridge) activities[1] violates section 15, 14b, 14 Third, 16 First and 17 of the Shipping Act, 1916 (Shipping Act or Act).[2] Administrative Law Judge Stanley M. Levy granted a motion to dismiss after receiving arguments from both sides.[3] Lykes has filed an "Appeal from Dismissal of Complaint" to which the respondent carriers (Respondents) have replied.

BACKGROUND

Lykes is a subsidized American Flag carrier primarily serving the U.S. Gulf. The terms of its operating subsidy agreement with the Maritime Administration prevent Lykes from making vessel calls at U.S. West Coast ports. The ability to call at Pacific Coast ports is necessary to engage in westbound minibridge service and Lykes does not offer minibridge transportation to the Far East.

Lykes also belongs to the Far East Conference (FEC or Conference), an association of some 15 ocean carriers organized to promote stability of service and uniformity of rates in the U.S. Atlantic and Gulf/Far East Trade.[4] The Conference publishes a tariff offering an *all water* service to

[1] Westbound or Far East minibridge service is a type of intermodal transportation wherein containerized cargo is tendered to ocean carriers at U.S. Atlantic or Gulf Coast port cities and transported by rail to West Coast ports where the containers are loaded aboard ocean vessels for carriage to destinations in the Far East. *Westbound minibridge service did not begin until early 1972.*

[2] 46 U.S.C. 814, 813a, 813 Third, 815 First and 816, respectively.

[3] "Motion to Dismiss Complaint Granted," served June 30, 1976 (Order of Dismissal).

[4] The FEC operates under an express conference agreement (FMC No. 17), filed with and approved by the Commission as required by Shipping Act section 15.

the Far East and maintains a Commission approved "dual rate" contract pursuant to Shipping Act section 14b.[5]

The FEC does not have express authority to adopt and file rates for any type of intermodal service to the Far East.[6] However, several FEC member lines provide a Far East minibridge service under *individually published tariffs*.[7] These minibridge carriers make direct vessel calls at Pacific Coast ports in order to provide such service and are also members of the Pacific Westbound Conference.

Some of the minibridge carriers offer intermodal rates equal to or lower than the FEC's all water contract rates. No minibridge carrier offers a discount to FEC contract shippers who use its intermodal service. Lykes has demanded that the FEC prohibit Far East minibridge operations by its member lines on the theory that minibridge service, or at least the lower rates charged for such service, violate the FEC Conference Agreement and the FEC Merchants Rate Contract. The Conference has refused to take action against the minibridge carrier.[8]

Close examination of Lykes' complaint reveals three separate, but related, charges of illegality: (1) Respondents are implementing a modified and unapproved version of Agreement No. 17 in violation of section 15 by failing to impose sanctions against the minibridge carriers; (2) Respondents are similarly employing a modified and unapproved version of the FEC Merchants Rate Contract in violation of sections 14b and 14 Third; and (3) Respondents' failure to take action against the minibridge carriers, *even if consistent with Agreement No. 17*, still results in unjust prejudice to Lykes and to the FEC's contract shippers, in violation of sections 15, 16 and 17.

Lykes alleges that Respondents' conduct has caused it substantial business losses and prays for the disapproval of Agreement No. 17. Alternatively, Lykes requests that the FEC be ordered to cease and desist from allowing its members to: (1) participate in both all water and minibridge service; *or* (2) offer minibridge rates lower than the FEC's all water rates.

The Presiding Officer rejected Lykes' arguments as a matter of law. His Order of Dismissal held that Agreement No. 17 applies only to all water shipments and that the FEC's acquiescence in the minibridge activities of some of its members was therefore not a *de facto* modification

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[5] The FEC Merchants Rate Contract provides a 15% discount to signatory shippers who pledge in return to confine their shipments to conference lines.

[6] The Commission has approved a section 15 agreement whereby the Pacific Westbound Conference (PWC) would fix intermodal rates for Far East cargo passing through Pacific Coast ports for an eighteen month period effective September 20, 1976. *Agreement No. 57-96 (FMC Docket No. 72-46)*, 16 S.R.R. 159 (1975). An amendment to the FEC Agreement authorizing intermodal operations with vessel loadings at Atlantic and Gulf Coast ports is now being examined in FMC Docket No. 74-53, *Agreement No. 17-34*. There is a substantial overlap (about 12 lines) in the membership of the FEC and the PWC and their activities are coordinated to a large extent by FMC Agreement Nos. 8200 and 10135. *Lykes does not belong to the PWC, but all nine of the FEC "minibridge carriers" do.*

[7] The PWC intermodal amendment (see note 7, *supra*) permits PWC member lines to separately engage in minibridge and other intermodal services until such time as a conference intermodal service is implemented. The PWC has yet to establish such a service.

[8] In November 1975, Lykes unsuccessfully proposed an amendment to the FEC Conference Agreement which would have prohibited member lines from offering minibridge service (Complaint, at 12).

of Agreement No. 17 or the dual rate contract promulgated thereunder. *Disposition of Container Marine Lines*, 11 F.M.C. 467, 486–491 (1968) was relied upon for the proposition that the FEC would have acted beyond the scope of Agreement No. 17 had it attempted to either curtail or encourage intermodal activities by its members, regardless of the competitive impact such activities might have upon the FEC's all water business.

The Presiding Officer further held that in the absence of allegations that the Respondents were concertedly attempting to establish FEC rates or practices in a manner injurious to nonminibridge carriers, Agreement No. 17 could not be found to unfairly discriminate against Lykes or FEC contract shippers.

POSITION OF THE PARTIES

A. *Lykes' Arguments*. Lykes begins by stating that it is not attacking the lawfulness of westbound minibridge service *per se*,[9] but only the compatibility of this service with FEC membership.

Lykes' principal assignment of error is that the Presiding Officer failed to recognize that the 1968 *Container Marine* decision, *supra*, concerned intermodal service between *interior inland points* and not between *ports;* it was not on its facts a "minibridge case." *Container Marine* is also allegedly distinguishable from the FEC situation because the conference agreement construed therein was expressly limited to "transportation by sea," whereas the FEC Agreement applies to "transportation between . . . ports." In Lykes' view, it therefore follows that Agreement No. 17 requires *all* rates on freight moving from Atlantic and Gulf Coast *ports* to be uniform, regardless of the manner in which the goods are conveyed. Lykes states that the FEC's permissiveness towards minibridge competition by its own members will destroy the very benefits the Conference and its dual rate system were created to confer.[10]

Lykes also alleges that the Presiding Officer erred in describing minibridge as a new service, different from the type of "port to port" transportation encompassed by Agreement No. 17, without explaining how he reached this conclusion. Lykes states that transcontinental rail/water service has existed from the turn of the century, albeit under combination rather than joint rates; the only "new" feature about minibridge service is that increased containerization has made such intermodal transportation financially attractive. In any event, Lykes contends that "newness" alone does not determine whether an activity is within the scope of an approved section 15 agreement. *E.g.*, when the

[9] This issue is already before the Commission in FMC Docket No. 73-35. Lykes has also challenged U.S. Gulf to Europe minibridge service as an unfair competitive device in FMC Docket No. 72-42 *et al.* See *State of Texas v. Seatrain International, S.A.*, 518 F.2d 176 (5th Cir. 1975).

[10] *I.e.*, frequent, regular service at stable, predictable rates which allowed forward selling, calculation of laid down costs, freedom from speculative risks and competitive equality in the market. *Alexander Report*, Vol. 4, 63d Cong., 2d Sess., at 295–303 (1914); *Isbrandtsen Co. v. North Atlantic Continental Freight Conference*, 3 F.M.B. 235, 238 (1950); *Agreement No. 8765—Gulf/Mediterranean Trade*, 7 F.M.C. 495, 499 (1963).

Panama Canal was opened, FEC members previously using the Suez Canal to reach the Far East were deemed to have Commission approval to operate via Panama.

Another Lykes exception is that the Presiding Officer misunderstood its argument that the minibridge carriers *released* FEC contract shippers from their obligation to exclusively patronize FEC vessels by offering "cut rate" minibridge service to non-contract shippers.[11] It is consistent with established principles of contract law to assert that FEC contract shippers are free to employ minibridge carriers while also asserting that the carriers offering minibridge service to contract shippers are in "breach" of the FEC Merchants Rate Contract.

Finally, Lykes claims its complaint should not have been dismissed without first permitting leave to amend. Lykes is now prepared to submit an amended complaint alleging that it has offered the FEC membership specific rate reductions on raw cotton intended to meet minibridge competition which were defeated along minibridge/nonminibridge lines.

B. *Arguments of the Respondents.* Respondents contend that Lykes' allegations all depend upon a finding that Agreement No. 17 presently gives the FEC authority to control the minibridge rates of its member lines.[12] Respondents believe such a finding cannot be made as a matter of law because: Agreement No. 17 does not expressly include intermodal transportation; true intermodal transportation was unknown when the FEC Agreement was first approved by the Commission; and to interpret Agreement No. 17 to include rate controls over unknown competitive factors would contravene the result in *Joint Agreement—Far East Conference and Pacific Westbound Conference.*[13]

Respondents state that control over intermodal rates of any type is not an "interstitial" matter which might routinely come within the scope of a conference agreement without additional section 15 approval; language in the *Container Marine* decision indicates that the Commission's action there rested upon policy matters as well as particular facts, 11 F.M.C. 489–490. This policy is further reflected in the Commission's decision to approve Far East intermodal service by the PWC instead of the FEC. *Agreement No. 57–96, supra,* at 166–167.

Respondents also claim that no independent significance can be given the FEC Merchants Rate Contract. If a conference agreement does not apply to minibridge traffic, that conference's dual rate contract is similarly limited in scope. *Contract Routing Restrictions,* 2 U.S.M.C. 220 (1939); *Swift & Co. v. Gulf & South Atlantic Havana Conference,* 6 F.M.B. 215

[11] Paragraph 1(d) of the FEC Merchants Rate Contract states:

The Carriers agree that they will not provide rates to anyone not bound by a shippers rate agreement with the Carriers . . .

[12] Respondents are not quite correct in this regard. Lykes alternatively claims that Agreement No. 17 is unfairly discriminatory because it *does not* allow minibridge rates to be controlled.

[13] 8 F.M.C. 553, 558 (1965). The Commission there found a section 15 violation to have occurred in part because a conference agreement did not describe in detail the procedures and arrangements under which allegedly approved concerted activities were to take place; an agreement must itself notify a reader of its scope without resort to extrinsic sources of information. See also *Investigation of Overland/OCP Rates,* 12 F.M.C. 184, 208–209 (1969).

(1961). The FEC further notes that conferences routinely apply for approval of agreements extending their contract systems to intermodal traffic once their section 15 agreements are similarly extended. *E.g.*, FMC Docket No. 76–11, *Agreement Nos. 150–DR–7 and 3103–DR–7.*

Finally, Respondents argue that the "open conference" requirement of section 15 should be interpreted to allow any all water operator to join the FEC with full voting rights, regardless of its other competitive interests. Respondents state that Lykes' inability to compete in the minibridge arena is voluntary in that it stems from a private business decision to operate as a subsidized carrier under the Merchant Marine Act of 1936. Respondents suggest Lykes would be best served by seeking relief from the Maritime Administration's subsidy restrictions, a procedure suggested in *States Marine Corp.—Subsidy, Tricontinent, etc., Services,* 5 F.M.B. 537, 549 (1959).

Discussion and Conclusions

Lykes has not described the type or amount of cargo it is allegedly losing to the minibridge carriers, but we shall assume for purposes of this appeal that Lykes is indeed suffering "substantial" business losses because it cannot influence the Conference majority on minibridge matters.[14] Despite these losses, we fully agree with the Presiding Officer's dismissal of Lykes' complaint as a matter of law.

Minibridge transportation is a full fledged intermodal service. As such, it differs in kind from the all water service historically offered by the FEC under Agreement No. 17. The FEC may not itself engage or prevent its members from engaging in any type of intermodal transportation without first receiving Commission approval of an express amendment to Agreement No. 17. Lykes' arguments to the contrary conflict with our decisions in *Disposition of Container Marine Lines, supra,* and *Agreement No. 57–96, supra.*[15] Lykes' first two charges against the FEC are therefore 180 degrees off base. Had the FEC acted to curb, encourage or regulate minibridge competition by its members, the lines joining in such action would have violated Shipping Act section 15, and possibly sections 14 Third and 14b.

Lykes' alternative argument, which assumes a conference agreement limited to all water transportation, also fails. In claiming that Agreement No. 17 discriminates unjustly against nonminibridge carriers, Lykes

[14] Lykes' post-dismissal offer to prove it has proposed rate reductions on raw cotton which were defeated by the Conference membership voting along mini-bridge lines, not only comes too late, but is irrelevant in light of Lykes' failure to claim that the minibridge carriers are *conspiring* to use Agreement No. 17 as an anticompetitive tool against nonminibridge lines. Lykes has alleged only that there are sufficient minibridge carriers in the Conference to *potentially* block anti-minibridge measures. Appeal, at 9 and 36–37. The *potential power* of the FEC's minibridge majority is not disputed. If Lykes believes the minibridge carriers have *actually exercised* their conference voting power in a concerted manner, dismissal of the instant complaint will not bar a subsequent action to prove such contentions.

[15] The latter decision conditionally approved PWC's intermodal agreements for 18 months and necessarily rejected the possibility that the FEC Agreement included the initiation or regulation of Far East minibridge transportation. See notes 7 and 8, *supra.*

ignores the fact that overland competition from PWC lines—the majority of which are also FEC members—has existed for over 50 years. See *Investigation of Overland/OCP Rates*, 12 F.M.C. 184, 189–204 (1969). Carriers belonging to both the PWC and FEC have regularly obtained cargoes under preferential PWC "overland" tariffs from territory commonly served by the FEC without such competition being considered discriminatory against exclusively FEC carriers such as Lykes. *Id.*, at 204–226. At the heart of Lykes' complaint is its dissatisfaction with being philosophically outnumbered within the FEC on intermodal questions and other matters concerning the PWC. Yet, only Lykes' own business judgment causes it to lose business to the majority of FEC lines who serve Pacific Coast ports. This type of economic "favoritism" is not unfair or unjustly discriminatory within the meaning of sections 15, 16 and 17. Conference members can be expected to differ on matters of competitive importance. For one viewpoint to prevail, even on a consistent basis, is not alone a Shipping Act violation. There is no unfairness in a carrier independently and openly voting on conference issues in a manner which best serves its private economic interests. Neither should conference members be prevented from competing with each other or the conference itself by separately providing services not encompassed by the conference agreement. Mere competition is not actionable, even if all conference members are unable to offer the alternative service in question.

Lykes' contention that Agreement No. 17 unjustly discriminates against contract shippers by providing a low cost alternative service to their noncontract competitors borders on the frivolous. The FEC Merchants Rate Contract is limited to all water service, and contract shippers desiring to use this service continue to receive a preferential discount not available to their noncontract, all water competitors. Far East minibridge service is available to contract and noncontract shippers on a completely equal basis. There is neither discrimination nor disadvantage present in such an arrangement. Moreover, a section 14b dual rate contract is not intended to *prevent* noncontract shippers from "reaching foreign markets at an advantageous rate," as implied by Lykes, but only to provide a reasonable economic incentive for those shippers who do patronize conference vessels exclusively.

To force nine minibridge carriers to elect between conference membership or intermodal operation would be to order the tail to wag the dog. A single FEC carrier cannot be allowed to stifle the nonconference activities of other conference lines simply by refusing to participate in them.

WHEREFORE, IT IS ORDERED, That the "Appeal from Dismissal of Complaint" of Lykes Bros. Steamship Co., Inc., IS DENIED.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-14

AGREEMENT NO. 10116-1—EXTENSION OF POOLING AGREEMENT IN THE EASTBOUND AND WESTBOUND TRADES BETWEEN JAPANESE PORTS AND PORTS IN CALIFORNIA, OREGON AND WASHINGTON

SUPPLEMENTAL ORDER

March 7, 1977

This is an investigation, commenced by Commission Order of March 5, 1976, the purpose of which is to determine whether Agreement No. 10116 shall continue in force and effect through December 31, 1978. The six lines party to the Agreement were named Respondents in the proceeding.[1] The Marine Cooks and Stewards Union was named Petitioner. The investigation was limited to the submission of affidavits of fact and memoranda of law, unless the Commission determined that an evidentiary hearing was required.

Respondents filed an affidavit and a memorandum of law. After resolution of an interlocutory dispute regarding Respondents' unsuccessful attempt to prevent the disclosure of some of the financial data contained in Respondents' affidavit, Petitioner filed an affidavit and a memorandum of law; and Hearing Counsel filed a memorandum of law. Respondents also moved for permission to file a rebuttal to Petitioner's and Hearing Counsel's affidavits. Petitioner opposed that motion, and Hearing Counsel supported Respondents. None of the parties to the proceeding requested oral argument.

Agreement No. 10116 was made in Tokyo, Japan on January 30, 1974, and filed with the Commission in Washington the next day. By that Agreement, the six Respondents pool the revenue derived by each Respondent from the carriage of cargo eastbound and westbound between ports in Japan and ports in the States of California, Oregon, and Washington, including overland common point cargo.

As originally filed, the Agreement provided for a term of three years from the date of approval. Sea-Land Service, Inc., filed comments with the Commission urging the Commission to limit the Agreement to a term

[1] Japan Line, Ltd.; Kawasaki Kisen Kaisha, Ltd.; Mitsui O.S.K. Lines, Ltd.; Nippon Yusen Kaisha; Showa Line, Ltd; and Yamashita-Shinnihon Steamship Co., Ltd.

of one year, so that the effect of the Agreement could be monitored. Instead of approving the Agreement, the Commission determined to subject it to investigation, and commenced a formal proceeding to that end, *Agreement No. 10116—Pooling Agreement In the Eastbound and Westbound Trades Between Japanese Ports and Ports in California, Oregan and Washington,* Docket No. 74–47. Respondents petitioned the Commission to reconsider the investigation. No one replied to that petition. Thereupon, the Commission discontinued the formal investigation, and approved the Agreement for a term of one year, through March 6, 1976.

Respondents filed Agreement No. 10116–1 on January 20, 1976. By that amendment, Agreement No. 10116 would continue in effect through December 31, 1978. Petitioner protested the approval of that amendment, and asserted that it was unjustly discriminatory and unfair as between carriers, and contrary to the public interest. Petitioner's objections to Agreement No. 10116 were that the Agreement permitted the strongest Respondent to sustain the weakest Respondent, thereby eliminating all competition among Respondents, which would permit Respondents to concentrate their economic power upon the other carriers in the trans-Pacific trades.

Because Petitioner's protest was somewhat vague, and time was short, the Commission granted interim approval to Agreement No. 10116–1, through March 6, 1977, and ordered an investigation into the approvability of the Agreement for the full term.

The evidence of record in this proceeding consists of a joint affidavit executed by six high executive officials of Respondents, an affidavit executed by Petitioner's counsel, the record in *Agreements Nos. 9718–3 and 9731–5,* Docket No. 75–30, decided by the Commission on November 1, 1976, and those matters noticed by the Commission.

Respondents are six steamship companies flying the flag of Japan. Among other enterprises, Respondents engage in the carriage of goods between the Pacific Coast of the United States and Japan. The trade between those two nations is carried by vessels flying many flags in addition to the flag of Japan, including the flag of the United States. This Agreement, among the only Japanese flag liner carriers in those trades, might have ramifications affecting the many nation states engaged in the trans-Pacific trades.

Petitioner asserted that Agreement No. 10116–1 is unjustly discriminatory and unfair as between carriers because it permits Respondents to perpetuate the monopoly of the U.S. Pacific-Japan trades achieved by reason of Respondents' several other agreements, to wit: their terminal agreements, and Agreement Nos. 9718, 9731, and 9835. Argued Petitioner, Agreement No. 10116–1 is unjustly discriminatory and unfair because those other agreements are unjustly discriminatory and unfair.

On November 1, 1976 the Commission held that Petitioner had failed to prove that Agreement Nos. 9718, 9731, and 9835 were unjustly discrimi-

natory or unfair as between carriers, and had failed to prove that Respondents had a monopoly of the trades between Japan and the Pacific Coast of the United States. *Agreements Nos. 9718–3 and 9731–5*, Docket No. 75–30 (November 1, 1976); "Agreement No. 9835–2, Order of Approval" (November 1, 1976). Petitioner has not adduced in the instant proceeding any further evidence bearing upon monopoly or unfairness. Since the Commission has already rejected the premise upon which Petitioner bases its conclusion in this proceeding, it follows that, there being no other premise offered, the conclusion has not been established. Consequently, the Commission finds that Petitioner has failed to prove that Agreement No. 10116–1 is unjustly discriminatory or unfair as between carriers.

Petitioner also argued that the pool, Agreement No. 10116, provides the cushion which keeps each Respondent participating in the space sharing, sailing rationalization, and terminal operation consortia, and that the pool permits the strongest Respondent to sustain the weakest. Respondents denied this, and argued that each Respondent carries so many revenue tons in the trades that they wouldn't think of leaving such a lucrative venture. In 1975, Showa Line, which carried the fewest number of revenue tons in the trades, carried 436,000 revenue tons. Kawasaki Kisen Kaisha carried the greatest number of revenue tons, 646,000. Even so, Nippon Ysen Kaisha received $1,024,176 from the pool and Kawasaki Kisen Kaisha received $553,610.00 in the final accounting for the period March 7, 1975 through March 6, 1976. In that period the other four carriers each contributed monies to the pool, ranging from $118,000 for Japan Line to $694,000 for Showa line.[2] The word "sustain" means supporting a carrier which would otherwise fail. Petitioner has not proved its allegation that the strongest Respondent sustains the weakest. Even though Nippon Ysen Kaisha received over a million dollars from the pool, it nevertheless grossed in excess of $33,000,000 and had net pool revenue in excess of $23,000,000, in the year ending March 6, 1976, more than any other Respondent.[3] The line which contributed the most money to the pool, Showa Line, carried the least amount of cargo.

Petitioner also argued that, after Respondents' pool went into effect, Respondents' market share rose at a steady pace, and, by January 1976, was 65.5 percent, higher than at any time during the preceding 22 months. Respondents argued that it has been the experience of Respondents to have higher cargo movements at the end of the year than at the beginning of the year, and point to the figures for 1974 to demonstrate that. Petitioner further replied that 1974 cannot be a proper measure as Respondents added three vessels to the trade between March and May of 1974, and that the increased cargo carryings in 1974 merely reflected the additional cargo attracted to Respondents by reason of the added vessels.

[2] The pool report of Respondents quoted was not offered by the parties to this proceeding, but is found in the files of the Commission, and is officially noticed.

[3] Nippon Yusen Kaisha received a distribution because it has a larger share than any other Respondent.

In fact, Respondents added the *Yamashin Maru* to the trades in March of 1974, the *Lions Gate Bridge* in April, the *Hakawa Maru* in May, and the *Beishu Maru* in October of 1974. As those vessels were placed in service older vessels were withdrawn from the trade. An examination of the data in this record shows that the percentage of each year's carryings, carried by each Respondent in each month in 1974 and 1975, when compared with similar data for all other carriers in the Trans-Pacific Freight Conference of Japan/Korea as a group, does not show that Respondents' experience in cargo carrying patterns is significantly different from all other conference carriers as a group. The data shows that in both 1974 and 1975 Respondents generally carried approximately 45 percent of each year's cargo in the first six months of that year. The other conference carriers, as a group, experienced approximately 51 percent of their cargo carryings in the first half of 1974 and about 46 percent in 1975.

Further, Petitioner neglected to mention that, although Respondents' share of the eastbound conference trade was 65.5 percent in January of 1976, it dropped to 60.4 percent in February of that year. Respondents carried approximately 62.4 percent of the Trans-Pacific Freight Conference of Korea cargo in each of the months of January and February of 1975. The data in the record does not demonstrate any consistent pattern of cargo carryings by or conference shares of Respondents. Respondents' share of the conference carryings in the years 1974 through 1976 are as follows:

Year	*Percentage of Trans-Pacific Freight Conference of Japan/Korea Cargo Carried by Respondents*		
	In Jan./Feb.	*In First Half of Year*	*In Whole Year*
1974	55.55%	54.63%	57.72%
1975	62.45%	56.49%	58.18%
1976	62.72%	?	?

That data will not support an inference that Respondents increased their share of conference cargo for all of 1976. Consequently, Petitioner has not established that Respondents have acquired a greater share of the conference trades as a result of Agreement No. 10116.

Petitioner has not proven that it has actually been injured by the Agreement. However, the record in this proceeding does not illuminate the full reach of all of the possible ramifications of the Agreement. So that the Commission may be assured that its decision will most fully serve the public interest, the Commission will conduct further inquiry into the subject matter of this investigation. In order to maximize the quantity of the pertinent information which the Commission will acquire by reason of this further inquiry, it will be conducted as a full scale evidentiary hearing under the supervision of an Administrative Law Judge of the Commission's Office of Administrative Law Judges. To further ensure a complete and useful record at the conclusion of this further inquiry, Hearing

Counsel is adjured to use the processes of the Commission to the fullest extent so as to *investigate* the subject of this proceeding, and to lay on the record the kind of detailed, reliable and probative evidence which will assist the Commission in making a proper disposition of this proceeding.

Because the Commission's concern with this Agreement has continued for some time now, this further inquiry shall, consistent with the fullest development of the facts, procede with the utmost expedition. That expedition is particularly necessary in this case because, in order to maintain the existing situation pending the completion of this further inquiry, the interim approval of Agreement No. 10116–1, heretofore granted, will be continued pending the completion of that further inquiry.

Since the Commission has herein ordered a further inquiry into this matter, Respondents' "Motion for Modification of Order of Investigation", wherein Respondents requested permission to file a rebuttal to the affidavits of Petitioner and Hearing Counsel, is moot, and will be denied as such.

In the further inquiry herein ordered the parties shall address themselves, evidentially and with specificity, to, among other things: overtonnaging in the trans-Pacific trades, and the effect of overtonnaging on stability in those trades; the existence of malpractice in those trades; the quantitative and qualitative effect of Agreement No. 10116, either alone or in connection with Respondents' terminal agreements and Agreement Nos. 9718, 9731, and 9835, upon overtonnaging and malpractices by members of the conferences in the trades, and by carriers not members of a conference in the trades; and how, why, and to what extent the self-policing provisions of those agreements creating the conferences in the trans-Pacific trades have not been effective to prevent the commission of malpractices in those trades. In addition to the matters referred to above, the parties to this proceeding are encouraged to develop that probative, reliable, and relevant evidence which will establish facts which will support the approval, modification or disapproval of Agreement No. 10116–1.

The evidence offered and accepted into the record in this further inquiry shall not be argumentative. Evidence offered by a party shall be internally consistent, or the inconsistencies shall be explained by a witness with personal knowledge of the explanatory facts. Statistics, and numerical data in general, shall be offered in such a way as to permit comparison. Where data is presented in different forms or is measured by different scales, evidence providing a method of conversion will be offered. Opinion evidence on matters within the expertise of the Commission is not desired, although the argument of counsel on those matters, in the brief, is encouraged.

THEREFORE, IT IS ORDERED, That the investigation herein, commenced by Commission Order of March 5, 1976, is referred to the Office of Administrative Law Judges of the Federal Maritime Commission for further inquiry and Initial Decision;

IT IS FURTHER ORDERED, That the affidavits and memoranda of Respondents and Petitioner and the record in Docket No. 75–30 shall continue to be part of the record of this proceeding;

IT IS FURTHER ORDERED, That the public hearings conducted pursuant to this order shall be held at a date and place to be determined and announced by the Presiding Administrative Law Judge, but in no event shall that hearing commence later than September 1, 1977;

IT IS FURTHER ORDERED, That the Federal Maritime Commission Order, dated March 5, 1976, entitled, *Agreement No. 10116–1—Extension of Pooling Agreement in the Eastbound and Westbound Trades Between Japanese Ports and Ports in California, Oregon and Washington*, "Order of Investigation", is modified by deleting, in the first ordering paragraph thereof, the words and numbers, ". . . for a term of one year, to and including March 6, 1977 . . .", and substituting therefor the words, ". . . pending the final order of the Commission in the proceeding instituted herein . . .";

IT IS FURTHER ORDERED, That Respondents' "Motion for Modification of Order of Investigation" is denied; and

IT IS FURTHER ORDERED, That this order be published in the *Federal Register*.

By the Commission.[4]

(S) JOSEPH C. POLKING,
Acting Secretary.

[4] Commissioner Casey dissents. Opinion will follow.

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

Subchapter A—General Provisions

[GENERAL ORDER 16 AMDT *17*, DOCKET NO. 76-66]

Part 502—Rules of Practice and Procedure

March 11, 1977

Extraneous and Ex Parte Communications

This proceeding was instituted by notice of proposed rulemaking published in the *Federal Register* of January 4, 1977 (42 F.R. 817). The purpose of the proceeding was to amend those sections of the Commission's rules of practice relating to ex parte communications in order to conform them to the requirements set forth in Section 4 of the "Government in the Sunshine Act" (P.L. 94-409, September 13, 1976) (the Act), which amended the Administrative Procedure Act (5 U.S.C. 551 et seq.) in the area of ex parte communications.[1]

Comments were submitted by Mr. Leonard G. James of the law firm of Graham and James and by Mr. Wade S. Hooker, Jr., of the law firm of Casey, Lane & Mittendorf. Mr. James essentially asks for clarification of the proposed rules with respect to the role of the Commission's Bureau of Hearing Counsel in Commission proceedings. He states that the proposed rules do not clearly establish that Hearing Counsel will be treated like any other party as regards the prohibitions against making ex parte communications and that some confusion exists because Hearing Counsel are employees of the Commission as well as parties to proceedings. The comments submitted by Mr. Hooker also deal mainly with suggested clarifications. Mr. Hooker believes that the rules should make clear that they apply only to proceedings subject to 5 U.S.C. 557(a), that only ex parte communications prohibited by paragraph (b) of the proposed rules are forbidden, that reference to a person who is a "party" or "agent of a party" is superfluous as a result of the Act and furthermore confusing in certain respects, and other matters. We have carefully considered these

[1] For a fuller explanation of the purpose of the proposed amendments, see the notice of proposed rulemaking cited above.

comments and, as discussed below, have adopted one suggestion contained therein. Our discussion follows.

We do not believe that the comments submitted by Mr. James require any change to the proposed rules. Mr. James expresses apprehensions that the Commission's Bureau of Hearing Counsel may be given special treatment so as to engage in the type of activity prohibited by the Act and the proposed rules. There is nothing in the proposed rules which should cause any such apprehension. Under the present rules, Hearing Counsel is designated as a party to a proceeding and is given no special treatment by virtue of the fact that they may be employees of the Commission. See Rule 3(b), 46 C.F.R. 502.42. Furthermore, in the type of proceeding with which the Act and proposed rules deal, Hearing Counsel is not an "employee who is or may reasonably be expected to be involved in the decisional process." There is therefore absolutely no cause for concern that the rules will somehow authorize Hearing Counsel to engage in forbidden ex parte practices and consequently there is no need to add clarifying language to them. Our present remarks in this regard should furthermore suffice to allay any possible concern.[2]

The comments submitted by Mr. Hooker, as noted, also deal with suggestions for clarifying language. After carefully considering them, however, we are of the opinion that for the most part they are unnecessary and in certain respects may even contravene the purposes of the Act.

Mr. Hooker suggests that the rules should make clear that they are applicable only to proceedings which are subject to 5 U.S.C. 557(a) rather than to any proceeding as defined in section 502.61 (Rule 5(a)), as presently proposed. Mr. Hooker fears that the rule's prohibitions might be applied to proceedings other than adjudicatory or certain formal rulemaking which was not intended by Congress, citing Senate Report 94–1176, 94th Cong., 2d Sess., p. 29. We are not adopting this suggestion. The proposed limitation is too narrow and could permit ex parte activity in proceedings intended to be covered. The legislative history cited by Mr. Hooker is not clear because it defines the applicability of the prohibitions to "formal adjudicatory" proceedings and "a few formal rulemaking proceedings." Whatever the intended scope of the Act, it clearly goes beyond proceedings covered by 5 U.S.C. 557(a).

Mr. Hooker suggests that the proposed rules delete reference to a "person who is a party to or agent of a party to any proceeding" or "who directly participates in any such proceeding", i.e., to delete any reference to a "party", his "agent", or "direct participant in a proceed-

[2] A good deal of the comments of Mr. James consist of unsubstantiated remarks to the effect that Hearing Counsel have customarily engaged in ex parte activity. Moreover, Mr. James appears to complain over the fact that Hearing Counsel have communicated with interested persons outside the Commission. Not only are these remarks unsubstantiated but in certain respects they are based upon an erroneous understanding of the law with respect to ex parte communications. Since Hearing Counsel are not involved in the decisional process, there is no prohibition against their communicating with persons outside the Commission. Indeed, in the conduct of their duties Hearing Counsel often contact shippers and other persons outside the Commission in order to obtain relevant evidence necessary for the development of a full and complete record.

ing" in the proposed rules. He asserts that the language in question is "made superfluous as a result of the Act." Alternatively, he suggests that reference to any "agent" be deleted. He asserts that reference to "agents" leads to confusion and is merely a carryover from the present Commission rule.

In our opinion the deletion of specific references to parties, their agents, or participants in proceedings would not only be unhelpful but more confusing. It is certainly not the intention of the Act to permit any of these persons to engage in ex parte activity. Our present rules which we are proposing to amend have long specified that the prohibitions apply to parties and their agents. Furthermore, as we stated in the notice of proposed rulemaking, cited above, specific reference to "parties", their "agents", "interested persons outside the Commission", and direct participants in proceedings will insure that previous law on the subject as well as the amendments contained in the Act will be encompassed.

The remainder of Mr. Hooker's comments consist of further suggestions for clarification. For example, he suggests that reference to ex parte communications in paragraphs (b)(4) and (6) specify that the type of communication in mind is that prohibited by paragraph (b) of the rule. We see no need for such additional clarification and believe that it is self-evident as to the type of ex parte communication which is intended to be prohibited.

A final suggestion, however, has merit. Mr. Hooker suggests that reference to a violation of the rule which could lead to sanctions against a party specify that the violation must occur with respect to paragraph (b) of the rule. Since the rule also contains a paragraph (a) which does not deal with ex parte communications but rather with other pleadings or documents which are objectionable for reasons having nothing to do with ex parte activity, we agree that the rule should be clarified as suggested.

Therefore, pursuant to section 4 of the Administrative Procedure Act [5 U.S.C. 553], sections 22 and 43 of the Shipping Act, 1916 [46 U.S.C. 821, 841a], and section 4 of the "Government in the Sunshine Act" [5 U.S.C. 557(d)], Part 502 of Title 46, Code of Federal Regulations, is amended.*

Effective Date. Inasmuch as the expeditious adoption of these rules is desirable and inasmuch as they are essentially procedural in nature, they shall be effective upon publication in the *Federal Register* and shall be applicable to all ex parte activities occurring on or after the effective date.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

*The text of the amendment is reprinted in 46 C.F.R. 502.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 506

DOW CHEMICAL INTERNATIONAL, INC.

v.

FAR EASTERN SHIPPING COMPANY

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

March 10, 1977

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on March 10, 1977.

It is Ordered, That applicant is authorized to waive collection of $36,202.94 of the charges previously assessed Dow Chemical International, Inc.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 506 that effective August 31, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from August 31, 1976, through October 7, 1976, the rate on 'Soda and or Sodium, viz: Caustic', minimum 500 tons per vessel is $50.00 per 1000 kilos, subject to a 5% freight forwarding commission and subject to all other applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 506

DOW CHEMICAL INTERNATIONAL, INC.

v.

FAR EASTERN SHIPPING COMPANY

Adopted March 10, 1977

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298) and section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Far Eastern Shipping Company (Far Eastern or Applicant) has applied for permission to waive collection of a portion of the freight charges on a shipment of caustic soda, that moved from Freeport, Texas, to Singapore, under Far Eastern bill of lading dated August 31, 1976. The application was filed January 25, 1977.

The subject shipment moved under Far Eastern Shipping Company Ocean Freight Tariff No. 18, FMC No. 18, original page 117, effective June 6, 1976, under the rate for the item "Soda and/or sodium, viz.: . . . Caustic" (Item 5090). The aggregate weight of the shipment was 2,252,770 pounds. The rate applicable at time of shipment was $77.50 per ton of 2000 pounds (weight only). The rate sought to be applied is $50 per 1000 kilos (weight only) for shipments of a minimum of 500 tons per vessel, and subject to a 5% freight forwarding commission. Far Eastern Shipping Company Ocean Freight Tariff No. 18, FMC No. 18, 1st revised page 117, effective October 7, 1976, item 5090.

Aggregate freight charges payable, pursuant to the rate applicable at time of shipment, amounted to $87,295.84. Aggregate freight charges at the rate sought to be applied amount to $51,091.90. The difference sought to be waived is $36,202.94. The Applicant is not aware of any other

[1] This decision became the decision of the Commission March 10, 1977.
[2] 46 U.S.C. 817, as amended.

shipment of the same commodity which moved via Far Eastern during the same time period at the rates involved in this shipment.

Far Eastern offers the following as grounds for granting the application:

> Movement of this cargo had been discussed between our pricing and sales departments and agreement was reached to publish the rate of $50.00 per metric ton with a minimum of 500 tons per vessel subject to a 5 percent freight forwarding commission. This rate was to be published upon notification by the sales department that cargo could be secured at this rate. When cargo was in fact secured a memorandum was given to the pricing department, however this memo was inadvertently misplaced and the appropriate rate was not filed until after the vessel had sailed and our agents requested clarification regarding this rate which they are unable to find in our tariffs. This is not a normal type of occurrence and we ask the Commission's indulgence to allow us to make this rate retroactive to cover this shipment as cargo could not have been secured at tariff rates published. Since rates as per the agreement were not filed due to administrative error we respectfully ask that we be allowed to collect only on the basis of the agreed rates and not the higher rates.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 6(b), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent failure to file the special rate for shipments of the subject commodity weighing a minimum of 500 tons per vessel, as had been promised to the shipper.

2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Far Eastern filed a new tariff which set forth the rate on which such waiver would be based.

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[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) &(c).

4. The application was filed within 180 days from the date of the subject shipment.

Accordingly, permission is granted to Far Eastern Shipping Company to waive collection of a portion of the freight charges, specifically the amount of $36,202.94. An appropriate notice will be published in Far Eastern's tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
February 16, 1977.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 504

UNITED STATES MAHOGANY CORPORATION

v.

SOLAR INTERNATIONAL SHIPPING AGENCY, INC., (AS AGENTS FOR) YANGMING MARINE LINE

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

March 10, 1977

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on March 10, 1977.

It is Ordered, That applicant is authorized to waive collection of $486.55 of the charges previously assessed United States Mahogany Corporation.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 504 that effective July 15, 1976, for purposes of refund or waiver or freight charges on any shipments which may have been shipped during the period from July 15, 1976 through September 17, 1976, the rate on 'Lumber—Rough Sawn, in Bundles' is $48.00 M, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 504

UNITED STATES MAHOGANY CORP.

v.

SOLAR INTERNATIONAL SHIPPING AGENCY, INC., (AS AGENTS FOR) YANGMING MARINE LINE

Adopted March 10, 1977

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298) and section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Yangming Marine Line (Yangming or Applicant) has applied for permission to waive collection of a portion of the freight charges on two shipments of lumber, that moved from Taiwan via Japan to New York, under Yangming bills of lading dated July 31, 1976 and September 9, 1976. The application was initially filed on January 7, 1977, with an amendment filed February 9, 1977. (The amendment corrected an error in computation.)

The subject shipments moved under Yangming Marine Transport Corporation Freight Tariff No FMC–6, which governs shipments from Taiwan, Republic of China, to Atlantic, Gulf Ports & San Juan, P.R., at page 101 (original), with an effective date of July 15, 1976. That page indicates that for "Lumber—rough sawn, in bundles, not exceeding 9 meters in length" the rate was to be $48 per cubic meter or $99 per 1000 kilograms, "whichever produces the greater revenue." On that basis, the two shipments (55.985 cubic meters and 30,575 kilograms, and 31.912 cubic meters and 18.028 kilograms) were billed total aggregate freight charges of $4,942.93, including bunker surcharges of $2.70 per ton of 1000 kgs. or 1 cubic meter, whichever is greater (Yangming Freight Tariff, FMC–6, at page 101 (orig.), effective July 15, 1976). The rate sought to be

[1] This decision became the decision of the Commission March 10, 1977.
[2] 46 U.S.C. 817, as amended.

applied is $48 per cubic meter (weight only) plus the same bunker charge of $2.70.

The Applicant had first filed for waiver of collection based at the $48 rate mentioned above, but through some misunderstanding in the contents of the filing and the complexities of several overlapping tariff page revisions ("temporaries" and "corrections"), was told that it appeared that a $51 per cubic meter rate (weight only) would have to be the basis of its claim for waiver of collection. Accordingly, the Applicant refiled with the Commission a new application based upon the $51 rate. After this $51 rate-basis filing and assignment of the case to an Administrative Law Judge, it became clear from a careful review of the pertinent tariff pages on file with the Commission, that only the $48 (weight only) rate could be used as the basis for any waiver of collection, in view of the sequence of the tariff filings (revisions) and taking into consideration the different time-notice requirements for increases and decreases in rates. Thereupon, the Applicant (Yangming) amended the computation in its application to reflect its original $48 per cubic meter rate-basis request.

Aggregate freight charges payable, pursuant to the rate applicable at the times of shipment, amounted to $4,942.93. Aggregate freight charges at the rate sought to be applied amounted to $4,456.38. The difference, collection of which is sought to be waived, is $486.55 (total for two shipments). The Applicant is not aware of any shipments of other than the complainant of the same or similar commodity, which moved via Applicant (respondent) during the same time period in which the tariff rates above-recited (original and requested) governed.

Yangming offers the following as grounds for granting the application:

(4) This Special Docket Application is being submitted to waive collection of a portion of freight charges amounting to ($486.55)* on the referenced shipments.

On July 15, 1976, Messrs, Yang Ming Marine Line filed rates for lumber—rough sawn, in bundles—at $48. per cubic meter, or $99.00 per 1000 kgs. This rate was filed under Yang Ming Marine Transport Corporation tariff FMC–6 and appeared at page 101 (see annexture).

The rate of $99. per 1000 kgs, was filed in error but was subsequently deleted on September 17, 1976. (See annexture). On September 24, the rate was adjusted to its present amount (see annexture).

As a result of this error Yang Ming Marine Transport Corporation received a complaint from United States Mahogany Corporation which has imported two shipments of lumber from Taiwan to New York on July 31 and September 9, 1976. The freight was charged at the rate of $99.00 per 1000 kgs. plus bunker surcharge of 2.70 per ton, which resulted in a 90% rate hike (see letter from U.S. Mahogany annexed hereto).

In order to remedy the effects of this error, we are filing this Special Docket Application on behalf of Yang Ming Marine Transport Corporation to request the Commission's permission to revise the freight charges of the aforementioned shipments to ($48 per cubic meter plus $2.70 bunker surcharge).*

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 6(b), *Special Docket Applications,* Rules of

*Per amendment letter dated February 9, 1977.
*Per amendment letter dated February 9, 1977.

Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent filing of a "weight" rate in addition to the "measure" rate, when only a rate by measure had been intended, as was customary in the lumber trade.
2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.
3. Prior to applying for authority to waive collection of a portion of the freight charges, Yangming filed a new tariff which set forth the rate on which such waiver would be based.
4. The application was filed within one hundred and eighty days from the date of the subject shipments.

Accordingly, permission is granted to Yangming Marine Line, to waive collection of a portion of the freight charges, specifically the amount of $486.55. An appropriate notice will be published in Yangming's tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
February 15, 1977.

[3] For other provisions and requirements, see § 18(b)(3)and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 372(I)

YASUTOMO & CO.

v.

Y. S. LINES

NOTICE OF DETERMINATION TO REVIEW

March 10, 1977

Notice is hereby given that the Commission on March 10, 1977, determined to review the order of dismissal of complaint and discontinuance of proceeding served February 28, 1977 in this proceeding.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 373(I)

AVIVA ENTERPRISES, INC.

v.

Y. S. LINES

NOTICE OF DETERMINATION TO REVIEW

March 10, 1977

Notice is hereby given that the Commission on March 10, 1977, determined to review the order of dismissal of complaint and discontinuance of proceeding served February 28, 1977 in this proceeding.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 74-25

TWIN EXPRESS, INC.

v.

SEA-LAND SERVICE, INC., ET AL.

NOTICE OF DETERMINATION NOT TO REVIEW

March 11, 1977

Notice is hereby given that the Commission on March 11, 1977 determined not to review the order of discontinuance in this proceeding served February 10, 1977.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 74-25

TWIN EXPRESS, INC.

v.

SEA-LAND SERVICE, INC., ET AL.

ORDER DISCONTINUING PROCEEDING

February 10, 1977

The Complainant having requested that its complaint herein be withdrawn,

Ordered:

This proceeding is discontinued.

(S) STANLEY M. LEVY,
Administrative Law Judge.

FEDERAL MARITIME COMMISSION

No. 75-48

SEA-LAND SERVICE, INC.

v.

THE CITY OF ANCHORAGE, ALASKA AND TOTEM OCEAN TRAILER EXPRESS, INC.

No. 76-4

ANCHORAGE, ALASKA

v.

SEA-LAND SERVICE, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

March 11, 1977

Notice is hereby given that the Commission on March 11, 1977 determined not to review the order of dismissal of respondent and discontinuance of proceeding served in these proceedings February 11, 1977.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 75–48

SEA-LAND SERVICE, INC.

v.

THE CITY OF ANCHORAGE, ALASKA AND TOTEM OCEAN TRAILER EXPRESS, INC.

DISMISSAL OF COMPLAINT AND DISCONTINUANCE OF PROCEEDING

May 19, 1977

Complainant, Sea-Land Service, Inc. (Sea-Land), complained that its vessel *S. S. Mobile* was improperly evicted from Terminal No. 1 at the Anchorage City Dock in order that a vessel of respondent Totem Ocean Trailer Express, Inc. (Totem) could be berthed. Sea-Land further complained that the Totem vessel did cause a break in the bus bar conductor system which had the effect of precluding the movement of contained cranes at Terminal No. 3 of the Anchorage City Dock so that Sea-Land's vessels could not utilize dockside space at Terminal No. 3. Sea-Land sought reparations for the acts of Totem.

Sea-Land in its complaint joined the City of Anchorage as a respondent but by order dated February 11, 1977, the City of Anchorage was dismissed as a respondent.

The parties have now entered into a statement of satisfaction and settlement agreement whereby Totem has agreed to pay ten thousand dollars ($10,000.00) in satisfaction of the alleged claims upon dismissal of the complaint with prejudice.

The parties further agree that the settlement agreement shall not prevent either party from alleging or contending in any court that any conduct or acts alleged in any complaint or action before the Federal Maritime Commission constituted, or were part of, or were evidence of violation of any federal or state laws, provided, however, Sea-Land is precluded from seeking further relief in any action for the specific matters in its complaint in FMC Docket No. 75–48.

The parties have jointly requested that the complaint in Docket No. 75–48 be dismissed with prejudice and that the proceeding be discontinued.

Good cause appearing, the parties have settled the issue between them, and because no useful regulatory purpose would be served by continuing this complaint proceeding, it is hereby:

Ordered: The complaint herein is dismissed with prejudice and this proceeding is discontinued.

(S) STANLEY M. LEVY,
Administrative Law Judge.

FEDERAL MARITIME COMMISSION

DOCKET NO. 74-10

FREIGHT FORWARDER BIDS ON GOVERNMENT SHIPMENTS AT UNITED STATES PORTS—POSSIBLE VIOLATIONS OF THE SHIPPING ACT, 1916, AND GENERAL ORDER 4

Fees assessed GSA for ocean freight forwarding services found, in certain instances, to violate section 16 First, of the Shipping Act, 1916, and Commission General Order 4.

Freight forwarder services must be charged for uniformly to avoid giving unreasonable preference or advantage.

Issues of whether section 35 exemption should be granted or whether General Order 4 should be amended to include a rule governing the practices of forwarders bidding on GSA contracts and providing services thereunder held under advisement pending further review.

Frank J. Costello for Air-Sea Forwarders, Inc.

W. B. Ewers for Cobal International, Inc.

Thomas H. McGowan for Meyer Shipping Company.

Gerald H. Ullman for National Customs Brokers and Forwarders Association of America and New York Foreign Freight Forwarders and Brokers Association.

Francis X. Davis, Leonard Salters and *William Smith* for General Services Administration.

C. Douglass Miller and *C. Jonathan Renner,* Hearing Counsel.

REPORT AND ORDER

March 18, 1977

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett, Bob Casey and James V. Day, *Commissioners*)

The Commission instituted this proceeding to determine: (1) whether the practices of Respondent ocean freight forwarders,[1] as they relate to bidding for forwarding contracts tendered by the Government Services Administration (GSA) of the United States and rendering services thereunder are in violation of section 16 of the Shipping Act, 1916 (the

[1] Air-Sea Forwarders, Inc. (Air-Sea); Alltransport Incorporated (Alltransport); Geo. S. Bush Co., Inc. (Bush); Cobal International, Inc. (Cobal); Gulf Florida Terminal Company (Gulf Florida); Meyer Shipping Company (Meyer); Ros Forwarding Services (Ros); and W. O. Smith and Co. (Smith).

Act), by subjecting a person, locality or description of traffic to unreasonable preference or prejudice or disadvantage; (2) whether such practices are contrary to section 510.24(b) of the Commission's General Order 4,[2] and; (3) whether the Commission's General Order 4 should be amended to govern the practices of forwarders bidding on GSA contracts and providing services thereunder, or possibly exempting such forwarder practices from Commission regulations under section 35 of the Act.[3] National Customs Brokers and Forwarders Association of America, Inc. (NCBFAA) and GSA intervened in the proceeding.

Administrative Law Judge Stanley M. Levy issued an Initial Decision, wherein he concluded, *inter alia,* that the fees charged GSA for forwarding services by Respondents Air-Sea, Meyer, Cobal and Smith violated both section 16 First of the Act and section 510.24(b) of General Order 4. Further, he concluded that section 510.24(b) should be amended to clearly indicate that it is unlawful to render forwarding services to any government agency for less than the average forwarding fee charged other users of similar freight forwarder services. Finally, he recommended that the ocean freight forwarder licenses of Air-Sea and Meyer be revoked and those of Cobal and Smith be suspended for six (6) months and thirty (30) days, respectively. Exceptions to the Initial Decision and replies to exceptions have been filed by Air-Sea, Cobal, Meyer, NCBFAA, GSA and Commission Hearing Counsel. The Commission heard Oral Argument.

FACTS

Since Fiscal Year (FY) 1960, GSA[4] has, pursuant to its competitive bidding system,[5] awarded annual ocean freight forwarding contracts to Commission Licensed ocean freight forwarders based upon the lowest bids submitted. Under GSA's competitive bid procedure, a bidder, if he is awarded a contract which normally runs for one year, must be prepared not only "to perform the service normally required of a forwarder,"[6] but

[2] Section 510.24(b) of the Commission's General Order 4 (46 C.F.R. 510.24(b)) provides as follows:

No licensee shall render, or offer to render, any forwarding service fee of charge or at a reduced freight forwarding fee in consideration of the licensee receiving compensation from ocean-going common carriers on the shipment; provided, however, that a licensee may perform freight forwarding services for recognized relief agencies or charitable organizations designated as such in the tariff of the ocean-going common carrier, free of charge, or at reduced fees.

[3] Section 35 authorizes the Commission to exempt activities of persons subject to its jurisdiction from the requirements of the Act where such exemption would not substantially impair effective regulation, be unjustly discriminatory, or be detrimental to commerce.

[4] GSA ships large volumes of ocean-going cargo of which a majority is for AID programs and utilizes ocean freight forwarder services in arranging such shipments.

[5] This system was initiated as a result of a 1958 decision of the Comptroller General that it was unlawful for GSA to continue its past practice of allowing forwarders to provide free forwarding services in consideration of anticipated brokerage from the carriers (37 Comp. Gen. 602 (1958)).

[6] Section 44 of the Act requires that in order for a forwarder to be entitled to brokerage he must solicit and secure cargo for the ship, book or otherwise arrange for space, and perform two of the following services:

(1) The coordination of the movement of the cargo to shipside;
(2) The preparation and processing of the ocean bill of lading;
(3) The preparation and processing of dock receipts or delivery orders;
(4) The preparation and processing of consular documents or export declarations;
(5) The payment of the ocean freight charges on such shipments.

also to maintain logs of GSA shipments, submit weekly export shipping reports as well as monthly status reports to GSA, and to provide the Maritime Administration of the Department of Commerce with copies of the bills of lading.

A comparative study of the services offered by the forwarders on commercial shipments and GSA shipments revealed that forwarding services are, for the most part, similar. The forwarding services generally offered with respect to commercial shipments are: (1) arranging movement of cargo to port and pier; (2) booking cargo; (3) preparing and processing export declarations; (4) preparing and processing bills of lading, and; (5) arranging insurance. With respect to GSA shipments, forwarders: (1) coordinate service to effect the movement of shipments from origin to vessel; (2) confirm GSA tentative space reservations; (3) prepare and process shipper export declarations when required; (4) prepare and process consular documents when required; and (5) prepare and process bills of lading.

Notwithstanding the above similarities, a considerable disparity exists between fees and ocean brokerage received from commercial vis-a-vis GSA shipments. The following lists the successful bidders on GSA shipments for FY 1973 in designated geographical areas and sets forth the fees assessed and amount bid for the handling of commercial and GSA shipments, respectively, by these forwarders; also indicated is the brokerage received on these shipments.

Port	*Forwarder*	*Amount Bid Per Shipment to GSA*	*Average Commercial Fee*	*Average Brokerage on GSA Shipments*	*Average Brokerage on Commercial Shipments*
Los Angeles	Air-Sea	$ 0.05	$22.88	$40.68	$ 6.57
San Francisco	Air-Sea	$ 0.05	$27.25	$20.38	$ 7.16
Seattle	Bush	$ 2.50	$13.48	$ 4.24	$13.51
Baltimore	Cobal	$ 1.25	$ 7.50	$19.12	$27.86
Houston	Cobal	$ 4.00	$20.76	$50.78	$14.80
New Orleans	Cobal	$ 4.00	$ 8.65	$ 3.03	$10.80
Philadelphia	Cobal	$10.00	—	$18.16	—
Tampa	Gulf Florida	$ 4.50	$ 6.00	—	—
Miami	Ross Forwarders	$ 6.00	$12.61	$ 0.60	$ 1.75
Chicago	Alltransport	$15.00	$15.60	—	—
New York	Meyer	$ 0.045	$30.48	—	—

The specifications in the GSA bid form advise the bidder that Federal Maritime Commission regulations prohibit licensed ocean freight forwarders from rendering "any forwarding service . . . at a reduced . . . fee in consideration of the licensee receiving compensation from ocean . . . carriers on the shipments." The specifications further require the bidder to certify that its price is "fully compensatory" for the forwarding service rendered without regard to any compensation paid to the forwarder by the ocean carrier.

DISCUSSION AND CONCLUSION

Jurisdiction

Some Respondents' contend that the Commission lacks the jurisdiction to investigate the practices at issue because GSA is as an executive agency of the United States and the assessment of reduced forwarding fees to a part of the Federal sovereign cannot result in "undue or unreasonable preference or advantage to any particular person," as that phrase is used in section 16 First of the Act. Heavy reliance is placed on *U.S. v. Cooper Corp.*, 312 U.S. 600, 604 (1941), where the Supreme Court stated that "in common usage, the term 'person' does not include the sovereign," and "statutes employing the phrase are ordinarily construed to exclude it."

The *Cooper* decision is hardly conclusive, however, for the Court itself, conceded that "there is no hard and fast rule of exclusion" and that the "purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute . . . may indicate an intent . . . to bring state or nation within the scope of the law." In *Cooper*, the Court, after reviewing the scheme, structure and legislative history of the Sherman Antitrust Act, determined that the United States was not a "person" for purposes of bringing a treble damage action under that statute.

We have reviewed the language, purpose and legislative history of the Shipping Act, 1916, and find no similar indication that the United States or one of its agencies is, or was intended to be, excluded from the term "person" as used in section 16 First of the Act. In absence of a clear indication to the contrary, we shall continue to consider GSA and other governmental agencies as "persons" under section 16 of the Act. This is not only appropriate and consistent with public policy but also in keeping with our long-standing practice of treating such agencies as "persons" for the purpose of filing a complaint under section 22 of the Act.[7] See *Far East Conference v. U.S.*, 342 U.S. 570, 576 (1952).

Even if GSA were not a "person" within the meaning of section 16 First, however, that section may nonetheless have been violated under the facts presented here. The prohibition against uneven treatment embodied in section 16 First extends not only to "persons" but also to a "description of traffic." Thus, as the Presiding Officer found: "Since GSA shipments describe a particular kind of traffic, section 16 is applicable even if the GSA is not a 'person' within section 16."

Violations of Section 16 First

Air-Sea, on exception, reargues a point raised before the Presiding Officer, and we find, properly disposed of by him. Air-Sea believes that a

[7] See also *California v. U.S.*, 320 U.S. 577, 585–86 (1944), where the Supreme Court determined that states and municipalities which own and operate dock facilities are "other persons" subject to the Shipping Act, 1916 which can be proceeded against for alleged violations of that Act.

finding of a section 16 First violation cannot be made here because it has not been established that GSA actually competes with commercial shippers. The Presiding Officer, in dismissing the need for a competitive relationship in this case, relied on the court's decision in *New York Foreign Freight Forwarder and Brokers Ass'n v. F.M.C.*, 337 F.2d 289 (1964), *cert. denied*, 380 U.S. 910 (1965) and the Commission's subsequent decision in *Valley Evaporating Co. v. Grace Line, Inc.*, 14 F.M.C. 16 (1970). In the *New York Freight Forwarder* case the court specifically rejected the argument that before a section 16 violation can be found a competitive relationship *must* be established.[8] There the court held that while an unlawful discrimination in transportation charges requires a showing of competitive relationship between two shippers who are charged different prices, this was not the case with respect to forwarder charges where a competitive relationship need not be shown to establish a violation of section 16 First. In *Valley Evaporating* the Commission again found a section 16 violation in the absence of a competitive relationship. In so doing, the Commission explained that:

> . . . while an effective competitive relationship is a necessary part of liability under section 16 in situations where the allegedly preferential or prejudicial rates or charges are geared to transportation facts or the different characteristics of commodities, it is not required where the carrier's obligation to render a particular service is "absolute" and not dependent upon such factors or differences. (14 F.M.C. at 21).[9]

These decisions are controlling here. Given the same service, forwarding fees should not vary by commodity as do ocean freight rates. On this point, the Presiding Officer found, and we agree, that:

> . . . the record was devoid of any evidence which would indicate that the handling of GSA shipments is materially or substantially different from the handling of a shipment for a commercial shipper.

While evidence indicates that a forwarder may not have to perform all the forwarding services listed in a GSA contract, the fact remains that a forwarder is contractually obligated to provide any and all those services upon request. These services generally correspond to those offered commercial shippers. Hence, at any given time, a forwarder will be performing the same services for GSA as he would for commercial accounts. In fact, General Services Administration Circular No. 320 actually describes GSA Ocean Freight Forwarder Contracts as requiring

[8] GSA argues that its shipments are not competitive for overseas markets with commercial shippers because the former are made in connection with development assistance programs. In this regard, GSA explains that it:

> . . . utilizes ocean freight forwarders only to provide a service on its own behalf and for other civilian executive agencies of the U.S. Government. It is a service organization and is not profit oriented. The greatest amount of GSA shipments are for AID programs, with tonnage figures for the past four years showing that 81 percent of the tonnage was shipped on behalf of the AID program. Other executive agencies of the U.S. Government utilizing GSA ocean freight forwarders were also acting largely on behalf of the AID program.

[9] The Commission reaffirmed this principle in *Violations of Sections 14 Fourth, 16 First, and 17, Shipping Act, 1916 in the Nonassessment of Fuel Surcharges on Military Sealift Command (MSC) Rates Under the MSC Request for Rate Proposals (RFP) Bidding System*, 15 F.M.C. 92 (1972). Citing *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525 (1966), the Commission there held that where a bunker charge had been assessed commercial cargo but not government cargo, no competitive relationship was necessary to establish a violation of section 16 First of the Act.

"the ocean freight forwarder to perform the service normally required of a forwarder engaged in this business."

Our finding that this record will not support the proposition that there are substantial differences between the amount of work required to handle a GSA shipment and that normally performed for commercial shippers further disposes of Air-Sea's argument that the GSA bids can be justified by factors of "cost, value of service or other transportation conditions." While, in practice, forwarders *may* do something less for GSA, we can think of no *single* forwarding function, (nor could GSA's own witness) which can be performed for the 5 cents per shipment bid made by Air-Sea. Clearly, the work involved in processing a GSA shipment is no less complex or time-consuming than with a commercial account. It follows that the costs involved in processing GSA and commercial shipments should be generally comparable. The simple fact of the matter is, however, that commercial clients are charged a substantially greater amount for essentially the same services than is GSA with no apparent transportation justification for the disparity.

One other explanation Air-Sea offers as to why GSA bids are so much lower than commercial fees is that because of the competitive environment it is allegedly a buyer's market for GSA as opposed to a seller's market for commercial shippers. We seriously question this unsupported contention considering the vast number of freight forwarders in the major ports as well as the large number of commercial shippers who could furnish a forwarder with more business than does GSA.[10]

Air-Sea also challenges the Presiding Officer's rejection of what he described as Air-Sea's "absorption theory." This "theory" which is advocated by Air-Sea and Meyer essentially holds that the cost and workload of processing GSA accounts can be absorbed without additional personnel and incurring any significant costs. Air-Sea argues that:

> . . . it is unfair and unrealistic to attempt to test these [forwarder] fees against some form of fully allocated cost standard. Apart from the impossibility of developing such a standard, the GSA business clearly generates incremental revenues which should be offset only against added out-of-pocket costs, costs which are *de minimis*.

[10] The following chart represents a breakdown of GSA and commercial shipments handled by certain Respondent forwarders at particular ports for the six month period from July 1, 1972 through December 31, 1972.

Forwarder	*Ports*	*No. of GSA Shipments*	*No. of Commercial Shipments*
Air-Sea	Los Angeles	130	1053
Air-Sea	San Francisco	676	205
Bush	Seattle	39	1375
Gulf Florida	Tampa	0	9
Ros Forwarding	Miami	1	1337
Cobal	Baltimore	238	408
Cobal	Houston	9	459
Cobal	New Orleans	667	1099
Meyer	New York	529	143
Smith	Hampton Roads	196*	399*

* For the six month period from July 1, 1973 to December 31, 1973.

The fatal flaw in this so-called "absorption theory" is, as the Presiding Officer noted, its failure to be applied to commercial accounts.[11] Air-Sea and Meyer would justify their 5 and 4½ cent bids to GSA, respectively, on the ground that incremental pricing allows them to absorb the additional work load without additional personnel and with only a *de minimis* increase in costs.[12] All *commercial* fees, however, were priced well above this level. Indeed, Air-Sea's lowest commercial fee in fiscal year 1973 was $15.00. Meyer's average commercial fee for the same period was $30.48 per shipment. Obviously, as Hearing Counsel have pointed out, "Mr. Meyer never considered costing commercial shipments on an incremental basis even during those years when his employees were underutilized and he had no GSA contract." The record here clearly indicates that GSA is the only shipper that ever benefited from this incremental pricing approach. Respondents' failure to even consider the application of the "absorption" theory to its commercial accounts or to provide any explanation as to why incremental pricing is appropriate for GSA accounts but not for commercial accounts renders that approach unjustly and unlawfully discriminatory.

Whatever the merits of the "absorption" or incremental pricing approach in principle, it is beyond dispute, as we have indicated earlier, that the incremental costs associated with the processing of a GSA shipment necessarily amount to more than 4½ or 5 cents. In addition to the "normal" forwarding services which they have contracted to provide, forwarders handling GSA shipments must also maintain a log on each GSA transaction, furnish GSA with a monthly report on shipments handled, transmit copies of bills of lading to the Maritime Administration, and wait between 60 and 90 days to be paid (a longer time than on commercial shipments). We simply cannot accept the suggestion that all this work, whatever effort is made to minimize it, can be done for as low as 4½ cents. The Commission therefore concurs in the Presiding Officer's conclusion that the "absorption theory" is discriminatory as between shipper customers and his rejection of that theory as justification for the disparate forwarder fees assessed GSA vis-a-vis commercial shippers.

It is also argued on exception that continuing the present GSA bidding practices is in the public interest in that it has caused the Government to receive quality service at low rates while at the same injuring no one. This contention is without merit. By enacting section 16 of the Act, among other provisions, Congress has established the "public policy" to

[11] Hearing Counsel advise that none of the Respondents have ever considered incremental pricing with respect to their commercial accounts.

[12] On exception Meyer argues that it is "incorrect to refer to . . . [its] schedule fees as having been limited to 4½ cents for each shipment accomplished for GSA" because "most shippers" were allegedly charged "an additional $5 per shipment for securing dock receipts." This contention is not particularly persuasive. First, there appears to be some dispute between Meyer and GSA as to whether Meyer had a contractual right to charge and collect its $5 charge on FAS shipments or whether Meyer had an obligation to provide the receipts within the contract price of 4½ cents. Secondly, even assuming that Meyer could legally exact $5 for the issuance of the dock receipt on FAS shipments, and we certainly do not propose to decide this here, we cannot find on this record that the $5 fee was in every instance tacked on to the 4½ cents bid charge to GSA. In fact, that the $5 fee was, even according to Meyer, assessable only on FAS shipments would in and of itself indicate otherwise.

be the fair and even-handed treatment of similarly situated shippers and localities. Respondents are furnishing GSA unwarranted advantage in clear contravention of that policy. In this regard, the Presiding Officer's discussion is particularly appropriate and bears repeating:

> No one would seriously argue against the general proposition that the government should pay the lowest prices it can. But such proposition carries within it the inchoate covent [sic] "proper and appropriate in the circumstances." No one, for example, would suggest that the government should buy stolen goods because such goods can be obtained for less than the usual [and legal] price. Similarly, as here, the government should not obtain services at prices which violate public policy and the statutes and regulations enacted and promulgated in conformity therewith. Nothing Congress has mandated to GSA in its procurement responsibilities contains within it a prescription to violate other statutes and regulations, be a party to such violations, or aid and abet such violations.
>
> The public policy, to the extent it is expressed in sections 16 and 44 of the Shipping Act, 1916, establishes that no shipper should be given an unreasonable preference or advantage and forwarder services shall not be rendered at reduced rates in consideration of receiving brokerage from carriers. The prices bid to GSA in many instances reflect a direct violation of that policy.

Moreover, we do not necessarily agree with Air-Sea that the GSA bidding practices followed by certain Respondents here have injured no one. In fact, our findings would indicate otherwise. To the extent the low fees bid GSA for forwarding fees have not recovered the forwarders costs for performing such services, they have arguably made commercial customers pay costs attributable to GSA shipments. If a commercial shipper is called upon to subsidize any costs of processing GSA shipments it follows that such shipper has been financially injured to some degree. Clearly, Air-Sea's bid for 5 cents does not cover incremental costs, let alone distributed costs. Thus, a clear potential for subsidization exists. We cannot therefore, accept the conclusionary assurance that "simply no one has been even remotely injured" by its practices.[13]

Nor, as Air-Sea argues, will requiring forwarders to establish reasonable and equitable charges for the handling of GSA shipments run contrary to the public interest by "substantially restrain[ing] competition within the entire forwarder industry." Our decision here does nothing more than require Respondents to honor an obligation imposed on them by law, *i.e.*, that once a particular forwarding fee is established by a forwarder for a particular service based on the circumstances of his operation, this fee be made available to all shippers equally. In any event and as a practical matter, because it is extremely unlikely that all forwarders are so similar in their operations that they share the same costs and independently would arrive at same fees and charges, we fail to see how all competition on fees and services will be eliminated by our action here. Even if that were the result of our decision, however, that decision would be no less dictated by the requirements of the Shipping Act, 1916. Our authority to

[13] Even if it could be somehow shown that the low bids assessed GSA did not result in measurable financial losses, Respondents would not be absolved of the violations found. The potential for injury is clear and exists with or without finding of specific economic damage. The extent of injury is only critical in a reparation context.

take whatever action necessary to remedy discriminatory practices has long been recognized. See *California v. U.S., supra,* at p. 583.

After review and consideration of the record in this proceeding, including the Initial Decision and matters raised on exception, we concur in the Presiding Officer's conclusion that the unjustified disparity of fees charged GSA and commercial shippers by Air-Sea, Meyer Cobal and Smith resulted in violations of section 16 First of the Act. The facts of record clearly establish that the bidding practices followed by the above-named Respondent forwarders during the period at issue herein resulted in the unwarranted preferential treatment of GSA over commercial shippers. Bids submitted on a per shipment basis were as low as 4½ cents (Meyer) and 5 cents (Air-Sea). In the case of Air-Sea, Meyer and Cobal,[14] there are wide variations between the per shipment charge to GSA and the average per shipment charge on commercial shipments.

While the variation between the level of the per shipment forwarding fees assessed GSA and commercial shippers by Smith would appear to be less substantial, the record discloses that the unit price per shipment charged GSA by Smith was less than the total forwarding fees collected for any single commercial shipment forwarded by it during the relevant period. Further, Smith has admitted that its GSA charges did not meet distributed costs although its commercial fees do reflect the reasonable value of services performed.

The pattern of fees assessed by forwarders found to be in violation of the Act reveals a clear pattern of reduction in fees charged GSA from those charged other shippers. This reduction is remarkable in every instance when one considers the aforementioned inherent similarity of the service obligations of a forwarder when handling GSA and commercial shipments. Under the circumstances, the Presiding Officer's findings of violations of section 16 First by Air-Sea, Meyer, Cobal and Smith are manifestly proper and well-founded.

With respect to the forwarding activities of Bush, Ros Forwarding, Gulf-Florida, and Alltransport, all of whom are licensed by the Commission, we agree with the Presiding Officer that the evidence of record does not sustain any violation of section 16 First by those Respondents.

Violations of Section 510.24 of General Order 4

Section 510.24(b)of General Order 4, as previously noted, prohibits forwarders from rendering forwarding services for a reduced forwarding fee in consideration of brokerage. Section 510.21(m) defines the phrase "reduced forwarding fees" as: ". . . charges to a principal for forwarding services that are below the licensee's usual charges."

The Presiding Officer concluded that those forwarders who violated

[14] The differences in GSA versus commercial forwarder fees assessed by Cobal were, $4.00 to $20.76 (Houston); $4.00 to $8.65 (New Orleans); and $1.75 to $7.50 (Baltimore). This is in spite of Cobal's admission that "services of a freight forwarder performed on GSA and commercial shipments are not basically different, as measured by the end product."

section 16 First with their appreciably lower GSA bids were *only* offering such bids in consideration of receiving ocean brokerage from carriers to cover their forwarding costs in violation of section 510.24(b) of Commission General Order 4. This conclusion was essentially premised on the finding that based on the relevant factors "the average charges may fairly and reasonably be deemed to be a reflection of . . . usual charges for freight forwarder services."

Air-Sea, Meyer and Cobal except to the Presiding Officer's conclusion. Air-Sea and Cobal argue in part that "average" cannot be made synonymous with "usual." Air-Sea believes "it it absurd to equate 'average' with 'usual' " and that by so doing, the Commission makes "all of the fees under the norm illegal." Cobal explains that since the Commission's section 21 Order issued in conjunction with this proceeding did not request any breakdown of the fees charged by type of service provided, be it "usual" or "accessorial," the responses submitted reflect only the aggregate of the fees charged commercial shippers in each port served. Since the "average" fee allegedly does not reflect what services were performed for a particular shipper in return for the fee, Cobal submits that the Presiding Officer's comparison is invalid.

We do not believe that in all instances the "average" commercial fee will be the forwarder's "usual" fee. However, given the fact that the service provided to GSA and to commercial shippers was basically similar, and the number of both GSA and commercial shipments were sufficiently large in number to be deemed a reliable sample, the Presiding Officer's determination on this record that the "average" commercial fee for a given port reflects the forwarder's "usual" fee for that port is not unfounded.

But however the "usual charge" is to be measured or determined, the GSA bids found violative of section 510.24(b) are below any usual level and were demonstrably pegged at that level to take advantage of large volumes of GSA shipments and the accompanying brokerage. This is evident when one compares Air-Sea's GSA bid of 5 cents for Los Angeles, with its correspondent average ocean brokerage return of $40.68. Air-Sea received over $19,000 in the first half of FY 1973 for handling government shipments, only $45.70 of which can be attributed to forwarding fees paid by GSA.

In FY 1973, Cobal provided GSA with forwarding services for $4.00 per shipment at Houston contrasting with their average commercial price per shipment of $20.76. Average brokerage received by Cobal on GSA shipments at Houston was $50.78 during the same period. For the Respondents found to be in violation of the Act and the Commission regulations, there is evidence in the record of significant variations between the level of the per shipment bids on GSA shipments and brokerage received. The Presiding Officer found this variation to be of sufficient magnitude to give rise to the reasonable probability that the low bids offered GSA by Air-Sea, Meyer, Cobal, and Smith were in

consideration of the licensees receiving compensation from carriers in violation of section 510.24(b) of General Order 4.[15] We concur in this finding as being consistent with the matters of record herein.

Sanctions

Virtually all the parties filing exceptions oppose the sanctions imposed by the Presiding Officer, *i.e.*, revocation and suspension of certain Respondents' licenses, as being either unlawful, unwarranted or unreasonable. This challenge has already been considered by the Commission in its April 22, 1976 Order Clarifying Scope of Proceeding, wherein we set aside, as being beyond the scope of the proceeding, the punitive actions taken by the Presiding Officer.[16] No action in the form of revocation or suspension of forwarder licenses will be taken for violations found. The Commission intends, however, to monitor the activities of Respondents to ensure compliance with this Report and Order.

Presiding Officer's "Recommendations"

In the closing section of his Initial Decision, the Presiding Officer recommended two actions regarding the regulation of freight forwarder activities. First, he suggested that legislation prohibiting the payment of brokerage to forwarders should be enacted. The Presiding Officer reasoned that the practice of brokerage under section 44(e) of the Act is inconsistent with the concept "that no man can serve two masters." Second, the Presiding Officer recommended that the Commission by rule require freight forwarders to publish a schedule of their fees and charges. The publication of such schedules, he found, would conform to the requirements of both section 16 First and section 17 of the Act in that it would (1) make it more difficult to give any undue or unreasonable preference to any particular person, and; (2) require the establishment and observance of just and reasonable regulations and practices.

Air-Sea, Cobal and NCBFAA except to the Presiding Officer's collateral proposals on the ground, *inter alia,* that they are "gratuitous" and beyond the scope of this investigation. We agree. Whatever the merit of the "recommendations" advanced in the Initial Decision, they are clearly beyond the issues set down for hearing in this proceeding and will be disregarded.

Prospective Relief

A number of proposals to resolve the GSA fee problem at issue here have been advanced. These proposals can be broken down into two

[15] Because section 510.24(b) makes it unlawful for a licensee to "render, or *offer* to render" any forwarding service free of charge or at a reduced fee, a licensee who *only* offered to render, but never actually rendered, such service at free or reduced charge would still run afoul of that section.

[16] Pending before the Commission is a Motion to Withdraw Petition to Reopen Hearing filed by Smith. The Commission had originally been petitioned to reopen the hearing and remand the proceeding to the Presiding Officer in order that Smith might offer a defense to the sanctions ordered against it. In view of the Commission's Order of April 22, 1976, Smith now asks that it be allowed to withdraw that petition. Motion granted.

categories: (1) those advocating free or reduced rates for GSA, and (2) those suggesting minimum fee charged GSA. A discussion of each follows:

(1) Free or reduced rates.

GSA suggests that section 510.24(b) be amended to allow GSA to obtain forwarding services free of charge or at reduced rates. The justification offered for this amendment is that GSA is unique as a shipper, is not competitive with commercial shippers, and that the nature of its cargo and programs make its shipments indistinguishable from those of charity or relief organizations which, under section 510.24(b), are allowed free or reduced forwarding fees. We cannot subscribe to this proposal.

The "feeling" of the Committee on Merchant Marine and Fisheries as expressed in its Report on the bill, which ultimately added section 44 to the Shipping Act, 1916, was that:

> . . . services which have been performed by forwarders for shippers should be compensated for by the shippers and that where brokerage fees have been earned by the forwarders or brokers, then the carriers in turn should pay for these services at the historical rate. Both the carrier and the shipper should be expected to pay *and the charge to each by the forwarders should be the reasonable value of the forwarder's service to each.* (Emphasis added) (House Report No. 1096, accompanying H.R. 2488, 87th Cong., 1st Sess. p. 3).

There is nothing in the Act or its legislative history to support the conclusion that Government agencies are to be given preferred treatment on forwarding services. If GSA must pay the same terminal and ocean transportation charges as do commercial shippers, we see no reason why GSA should acquire a preferred status in regards to forwarding services. Any amendment to section 510.24(b) which would place GSA shipments in the same category as relief and charitable agencies[17] would in effect permit forwarders of GSA shipments to rely on brokerage from ocean carriers to cover the costs of processing such shipments. This would be clearly inconsistent with the intent of Congress expressed above.

Nor are we prepared at least at this time to exempt under section 35 of the Act shipments of the civilian executive agencies of the U.S. Government from the application of the provisions of the Shipping Act, 1916. However, we will continue to review this matter to determine the future feasibility of the requested exemption.

(2) Minimum fee charged GSA.

There have also been suggested to us three approaches for making GSA bids compensatory.

Hearing Counsel's proposal would establish a unit cost for GSA forwarding services by looking to the ratio of the commercial forwarding fees charged by the licensee in the previous year to the total revenue as a

[17] We intend to review the exemption for relief and charitable agencies in section 510.24(b) to determine whether it continues to be proper or lawful with the repeal of section 6 of the Intercoastal Shipping Act, 1933.

measure of the value of service to the shipper. In essence, Hearing Counsel's proposed rule is based on the premise that the forwarder's cost per shipment for forwarding commercial shipments in the previous year provides a reasonable indication of the cost associated with processing GSA shipments. This approach is allegedly geared towards preventing the shifting of the burden of paying for GSA services to the commercial shipper.

NCBFAA simply proposes to set the fee charged GSA to the average fee charged commercial accounts in the preceding fiscal year.

The Presiding Officer would amend section 510.24(b) to require that the forwarding fee assessed any government agency not be less than the average forwarding fee *for similar services* rendered to other accounts in the preceding year.

We are not convinced by the facts before us that the implementation of either of the formulas of Hearing Counsel or NCBFAA would accomplish the desired result. Nor are we prepared to accept the Presiding Officer's proposal without a more thorough review of existing forwarding services, practices and fees. We are reluctant to establish binding rules of universal application governing the level of freight forwarder fees on the basis of the existing limited record. The important matter of what objective standards, if any, should be adopted to judge the acceptability of forwarding GSA bids under the Shipping Act, 1916, and the Commission's regulations, is one that requires considerably more study and analysis. We do not intend to take any precipitous action, no matter how well motivated, that might result in the establishment of requirements which could prove impossible of application or unduly or unnecessarily disruptive of the freight forwarder industry. Whatever standards are finally adopted must be well-reasoned, economocally sound and consistent with responsible regulatory policy. In deciding not to prescribe detailed fee requirements, we are certainly not blind to the seriousness of the problems underlying the practices found unlawful herein. Quite to the contrary, it is our acute awareness and concern with these problems that prompts us to exercise restraint in prescribing a solution, lest we compound their consequences. In this case, delay *is* manifestly preferable to error.

We will therefore hold under advisement, pending further study[18] and review, the issue, raised in our Order instituting this proceeding, of "whether the Commission's General Order 4 should be amended to include a rule governing the practices of forwarders bidding on GSA contracts and providing services thereunder." In the interim, each freight forwarder issuing bids to GSA should determine and establish, based on his costs and the circumstances of his operation, the fee that will be assessed GSA for the processing of its shipments. Consistent with our

[18] This study will, as discussed earlier, include a consideration of the feasibility of exempting GSA shipments from the provisions of the Shipping Act, 1916, under section 35 of that Act.

findings herein, we would expect that whatever GSA fee is established be compensatory, equitable and nondiscriminatory vis-a-vis commercial accounts.

Conflict Between Laws

One final point should be addressed. GSA has placed heavy reliance on *U.S. v. Georgia Public Service Commission,* 371 U.S. 285 (1963), in its discussion of an alleged conflict between the laws administered by GSA and this Commission.[19] That reliance, however, is clearly misplaced. The issue here it not one of conflict between a federal statute and state law under the Supremacy Clause but rather one of reconciling the fairness requirements of the Shipping Act, 1916, with the federal procurement requirements of negotiated rates under the Federal Property Act. GSA's authority to obtain transportation at the "lowest over-all cost" does not overrule the requirement that the rate agreed upon for such transportation be lawful under the Shipping Act. This is particularly so since the Shipping Act contains no exemption of the type appearing in section 22 of the Interstate Commerce Act (ICA) granting the Government preferred status. Rates and charges assessed the Government must therefore be reasonable and nondiscriminatory and otherwise comply fully with the substantive provisions of the Shipping Act, 1916. Viewed in this light, there is no conflict between the requirements imposed by the Federal Property Act and the Shipping Act, 1916 and GSA's contention to the contrary must be rejected.

WHEREFORE, IT IS ORDERED, That Respondents Air-Sea Forwarders, Inc., Cobal International, Inc., Meyer Shipping Company, and W. O. Smith and Company immediately cease and desist from submitting bids to GSA for forwarding services to be provided thereunder which are inconsistent with our decision herein.

(S) JOSEPH C. POLKING,
Acting Secretary.

[19] This decision concerned a conflict between a federal procurement statute and a law of the State of Georgia governing the rates established for the transportation of household goods within that State. The Court held that the Supremacy Clause of the U.S. Constitution gave preference to the provisions of the Federal Property Act, (40 U.S.C. 481, *et al.*) which authorizes the Administrator of GSA to seek preferential treatment for fede.al shipments over the requirements of the state statute.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 336(I)

ALFRED KUBIES WESTERN CORP.

v.

ROYAL NETHERLANDS STEAMSHIP CO.

NOTICE OF DETERMINATION NOT TO REVIEW

March 17, 1977

Notice is hereby given that the Commission on March 17, 1977, determined not to review the decision of the Settlement Officer in this proceeding served March 9, 1977.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secetary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 336(I)

ALFRED KUBIES WESTERN CORP.

v.

ROYAL NETHERLANDS STEAMSHIP CO.

March 9, 1977

Reparation awarded.

DECISION OF JUAN E. PINE, SETTLEMENT OFFICER[1]

Alfred Kubies Western Corp. (complainant) claims $402.00 as reparation from Royal Netherlands Steamship Co. (carrier) for an alleged freight overcharge on a shipment carried from New York, New York to Port Au Prince, Haiti via the SS METEOR on bill of lading Number 92 dated May 21, 1975. The consignee was Firestone Interamerica Company, Port Au Prince. While the complainant does not specifically allege a violation of the Shipping Act, 1916, it is presumed to be Section 18(b)(3).

The carrier denied the claim on August 27, 1975 solely on the basis of Item 45(b), United States Atlantic and Gulf-Haiti Conference Freight Tariff F.M.C. No. 1 which provides in part:

". . . Adjustment of freight based on alleged error in . . . description will be declined unless application is submitted in writing sufficiently in advance to permit . . . verification of description before the cargo leaves the carrier's possession, . . ."[2]

The shipment consisted of 12 crates identified on the bill of lading as El. Commercial Freezers weighing 2,940 pounds and measuring 480 cubic feet. The carrier assessed a 4th class rate of $84.50 per measurement ton based on the tariff description of Food Freezers, Mechanical N.O.S. Complainant alleges that the shipment consisted of Food Freezers,

[1] Both parties having consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.301-304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2] With respect to a similar rule regarding the filing of a claim for reparation based on weights or measurements before the shipment involved leaves the custody of the carrier, in *Kraft Foods v. Moore McCormack Lines, Inc.*, in its report on remand served November 24, 1976 the Commission held "The Court of Appeals on review has determined that Rule 16 (a similar rule) is not a valid tariff provision, insofar as it conflicts with section 22 of the Shipping Act, 1916. . . . In effect the Rule sets up a period of limitation, the time during which the shipment remains in the custody of the carrier, which limitation was reviewed by the Court as infringing on the rights granted by section 22 of the Shipping Act. . . ."

Mechanical Household which take a class 18 rate of $51.00 per measurement ton. The surcharges would be identical using either description. Complainant alleges that instead of being charged $84.50 for 12 measurements tons, or $1,014.00 as it was, it should have been charged $51.00 for 12 measurement tons, or $612.00. The overcharge claim is for $402.00.

In support of its claim, the complainant has submitted the following:

1. A copy of the subject bill of lading describing the commodities as 12 Crates El. Commercial Freezers.

2. Complainant's commercial invoice number 10336 dated May 21, 1975, identifying the freezers as "Models H-16."

3. A Shipper's Export Declaration Correction Form dated July 10, 1975 filed by complainant with the Customs Director at the Port of New York changing the commodity description "Com. Food Freezers" to "El. Household Freezers." The comment thereon is "Inadvertent error in description."

4. A copy of complainant's original letter dated June 20, 1975 to the Consulate General of Haiti in New York, New York requesting a correction of the consular invoice amending the commodity description to read "Domestic Evercold Freezers for Operation on 115/60." A stamp and signature to the effect that the letter was seen and noted by the New York Consulate General of Haiti appears on the letter. Complainant advises that ordinarily no further action would be taken by the Consulate General.

5. Complainant's order (No. K-6504-R) of May 9, 1975, placed with the manufacturer, W. C. Wood Co. Ltd., Guelph, Canada for 12 Model H16 Evercold Freezers.

6. The manufacturer's price list effective on or after January 1, 1975 which indicates that Model H-16, as well as all other freezers on the list are household freezers.

7. A catalog of W. C. Wood Co., Ltd., the manufacturer, in which it is indicated "There are six basic sizes of Chest freezers built with the Wood's care to fit your family's needs." The photographs of the freezers and the descriptions thereof clearly indicate that they (including Model H-16) are household freezers. The measurements of Model H-16 are 46 1/8 inches long, 29 1/4 inches wide and 36 inches high. The capacity is 16 cubic feet.

Therefore, on the basis of the above information, it is found that an adequate substantiation of the complainant's claim that the shipment consisted of household freezers has been established. Complainant is awarded reparation of $402.00.

(S) JUAN E. PINE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 507

UNITED FORWARDERS SERVICE, INC.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

March 23, 1977

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission March 23, 1977.

It is Ordered, That applicant is authorized to waive collection of $362.50 of the charges previously assessed United Forwarders Service, Incorporated.

It is further Ordered, That applicant shall promptly publish in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 507 that effective September 16, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from September 16, 1976 through January 7, 1977, the rate on 'Rubber Goods: Soles' is $122.30 W/M, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 507

UNITED FORWARDERS SERVICE, INC.

v.

SEA-LAND SERVICE, INC.

Adopted March 23, 1977

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90-298) and section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Sea-Land Service, Inc. (Sea-Land or Applicant) has applied for permission to waive collection of a portion of the freight charges on a shipment of rubber soling that moved from Elizabeth, New Jersey to San Jose, Costa Rica, under a Sea-Land bill of landing dated December 18, 1976. The application was filed February 3, 1977.

The subject shipment moved under Sea-Land Tariff #261, FMC No. 140, original page 96, effective September 16, 1976, under the rate for the item "Rubber goods, viz: . . . Belting (through) Soles" (all under Item 3410). The aggregate weight of the shipment was 4,800 pounds, and it measured 145 cubic feet (3.625 measurement tons). The rate applicable at the time of shipment $222.30 W/M, i.e., $222.30 per ton of 2000 pounds or 40 cubic feet, whichever creates the greater revenue. The rate sought to be applied is $122.30 W/M, per Sea-Land Tariff #261, FMC No. 140, 1st revised page 96, item 3410, effective January 7, 1977 (correction No. 445).

Aggregate freight charges payable pursuant to the rate applicable at the time of shipment amounted to $805.84 ($22.30 × 3.625 measurement tons). Aggregate freight charges at the rate sought to be applied amount to $443.34. The difference sought to be waived is $362.50. The Applicant

[1] This decision became the decision of the Commission March 23, 1977.
[2] 46 U.S.C. 817, as amended.

is not aware of any other shipment of the same commodity which moved via Sea-Land during the same time period at the rates involved in this shipment.

Sea-Land offers the following as grounds for granting the application:

(4) In Sea-Land Service Tariff 217–A, FMC 102, Rubber Goods: Soles reflected a rate of $111.20 weight or measure whichever created the greater revenue. (exhibit 1)

Effective September 16, 1976 Section 1 of Tariff 217–A which named rates (including Rubber Goods: Soles) to Costa Rica was deleted from Tariff 217–A (exhibit 2) and were published (on statutory notice) in freight tariff 261, FMC No. 140. The rates named in Tariff 217–A were subject to a 10% General Rate Increase and were brought forward into Tariff 261 with the increase rolled in. In computing the 10% G.R.I. Rubber Goods: Soles which was at a level of $111.20 was to be increased to $122.30. Inadvertently the tariff clerk recorded the new rate as $222.30 (exhibit 3). The error in computation was not recognized and the incorrect rate was published on original page 96 Tariff 261 effective September 16, 1976 (exhibit 4). On December 24, 1976 United Forwarders, on behalf of American Biltrite forwarded a shipment of Rubber Soles to Costa Rica (exhibit 5). Upon receipt of the bill, United Forwarders noting the apparent rate error contacted Sea-Land salesman T. Petro, who in turn contacted M. Cox, Sea-Land Caribbean Pricing to notify him of the clerical error (exhibit 6).

On January 7, 1977 the rate was reduced to the proper level of $122.30 W/M (exhibits 7 and 8).

United Forwarder's paid Sea-Land (exhibit 9) based on $122.30 W/M.

A clerical error in computing an increased rate resulted an erroneous rate being published in Sea-Land Tariff 261. A corrected publication was made promptly following disclosure of the initial erroneous publication.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 816 (as amended by Public Law 90–298),and Rule 6(b), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tarif of a clerical or administrative nature, resulting in the inadvertent filing of a much higher rate than merely the intended new rate with the 10% general rate increase.

[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

2.Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate on which such waiver would be based.

4. The application was filed within 180 days from the date of the subject shipment.

Accordingly, permission is granted to Sea-Land to waive collection of a portion of the freight charges, specifically the amount of $362.50. An appropriate notice will be published in Sea-Land's tariff.

(S) THOMAS W. RRILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
March 2, 1977.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 367(I)

CATERPILLAR OVERSEAS, S.A.

v.

SPRINGBOK LINE, LTD.

NOTICE OF DETERMINATION NOT TO REVIEW

March 21, 1977

Notice is hereby given that the Commission on March 21, 1977, determined not to review the decision of the Settlement Officer in this proceeding served March 10, 1977.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 367(I)

CATERPILLAR OVERSEAS, S.A.

v.

SPRINGBOK LINE, LTD.

Dismissal of Complaint.

DECISION OF RONALD J. NIEFORTH, SETTLEMENT OFFICER[1]

By complaint filed October 15, 1976, Caterpillar Overseas, S.A. (complainant) alleges that Springbok Line, Ltd., (carrier) applied an incorrect rate on three shipments of "Engines and Parts, Viz: Automobile, Gasoline or Diesel and Parts, N.O.S." resulting in an overcharge of $1,863.77. It seeks refund of this amount pursuant to the informal procedure contained in Subpart S (46 CFR 502) of Commission's informal procedure for adjudication of small claims subject to discretionary Commission review.

While a violation of the Shipping Act, 1916, is not specifically alleged in support of complainant's petition, it appears from the nature of the complaint that the claim for refund relates to the requirements of Section 18(b)(3) which prohibits the assessment of rates and charges other than those specified in the carrier's tariff on file with the Commission and duly published and in effect at the time. It further appears that informal settlement of the complaint is considered by the carrier to be time barred by tariff Rule 16, entitled OVERCHARGES, which Rule places a limitation period of six months for the filing of claims described in the Rule. The merits of the complaint are therefore considered based upon these premises.

As noted in the complaint, the shipments here involved were previously the subject of a formal complaint (Docket No. 76–39) which was dismissed on jurisidictional grounds by Administrative Law Judge Glanzer by Initial Decision served September 30, 1976, after the filing of a joint Stipulation of Facts and Motion for Authorization to Settle. Dismissal of

[1] Both parties having consented to the informal procedure of Rule 19 of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof. (Note: Notice of determination not to review March 21, 1977).

the complaint did not restrict the complainant's right to resubmit its claim correcting the jurisdictional grounds defect found in Docket No. 76-39. The instant docket obviously is intended to accomplish this purpose.

The claim at issue involves a simple case of improper rate application wherein cargo described on the bill of lading as "Truck Engines, Diesel Engines Automotive for replacement" was assessed a different rate than that which is specified in the tariff as being applicable at the time. In lieu of a rate of $119.50 per cubic feet, which rate was assessed on the three shipments identified in the claim, the carrier's applicable United States/ South and East Africa Conference Southbound Freight Tariff No. 2, FMC No. 3, provided in Item 255, Second Revised Page 152, Correction 106, a base rate of $70.25 per 40 cubic foot or 2,240 pounds, which rate should have applied on the shipments in question.

Ordinarily this observation would warrant the issuance of an order directing that the overcharge of $1,863.77 be refunded to the complainant. In this instance however, such action would be redundant for the reason that a check in full settlement of the overcharge has in the meantime been paid by the carrier as confirmed in letter of November 12, 1976, submitted by attorney for the complainant.

While in ordinary circumstances, the carrier could be admonished for taking unilateral action in a proceeding before the Commission and thereby prejudging the decision which might be rendered, I find that from a regulatory standpoint, the conference tariff did not prohibit an informal settlement of the rate issue and there was, therefore, no legal necessity to bring the matter before this agency for formal resolution. This position is based upon the fact that an informal settlement of the claim was not time barred by Rule 16 of the tariff as the carrier apparently believed. A careful review of the Rule reveals that it does not extend to errors involving the mere misapplication of a rate, which is the issue in this Docket. It is noted that the rule could be phrased in a clearer manner by appropriately inserting the words "except as otherwise provided" in the first paragraph in order to alert a tariff user of the pertinent exception which appears in part (3) of the rule.

Following is a statement of the rule as it appears on pages 110 and 111 of the tariff:

OVERCHARGES

Claims for adjustment of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carrier in writing before shipment involved leaves the custody of the carrier. Any expenses incurred by the carrier in connection with its investigation of the claim shall be borne by the party responsible for the error, or, if no error be found by the claimant. All other claims for adjustment of freight charges must be presented to the carrier in writing

within six (6) months after date of shipment. The limitation of six months does not apply to U.S. Government or its agencies.

(1) For purpose of uniformity in handling claims for excess measurements, refunds will only be made as follows:

(a) Where an error has been made by the dock in calculation of measurements.
(b) Against re-measurements at port of loading prior to ship's departure.
(c) Against re-measurement by steamer's agent at destination.
(d) By Joint re-measurement of steamer's agent and consignee.
(e) By re-measurement of a marine surveyor when requested by steamer's agent.
(f) Re-measurement fees and cable expenses in all cases to be paid by party at fault.

(2) In cases of claims by shipper of overcharges in weight, certified invoice or weigher's certificate to be considered evidence of proper weight.
(3) Except those claims for obvious error in calculation or misapplication of rate or rate basis, all claims of adjustment in freight charges must be presented to the carrier in waiting within six months after date of shipment.

The assessment of a rate which differs from that which the tariff provides clearly falls within the exception provided in paragraph (3) above as it relates to "misapplication" of a rate.

Conclusion and Order

I find that in view of the fact that the claim at issue has been properly settled between the carrier and the complainant subsequent to the filing of this Docket with this Commission, and in view of the fact that there is no tariff regulation or statutory provision which bars the parties from informally taking such action, a formal order with respect to this Docket is unwarranted. Complaint dismissed.

(S) Ronald J. Niefort,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 368(I)

CATERPILLAR OVERSEAS, S.A.

v.

SOUTH AFRICAN MARINE CORPORATION, LTD.

NOTICE OF DETERMINATION NOT TO REVIEW

March 21, 1977

Notice is hereby given that the Commission on March 21, 1977, determined not to review the decision of the Settlement Officer in this proceeding served March 10, 1977.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 368(I)

CATERPILLAR OVERSEAS, S.A.

v.

SOUTH AFRICAN MARINE CORPORATION, LTD.

Dismissal of Complaint.

DECISION OF RONALD J. NIEFORTH, SETTLEMENT OFFICER[1]

By complaint filed October 15, 1976, Caterpillar Overseas, S.A. (complainant) alleges that South Africa Marine Corporation, Ltd., (carrier) applied an incorrect rate on three shipments of "Engines and Parts, Viz: Automobile, Gasoline or Diesel and Parts, N.O.S." resulting in an overcharge of $1,633.66. It seeks refund of this amount pursuant to the informal procedure contained in Subpart S (46 CFR 502) of Commission's informal procedure for adjudication of small claims subject to discretionary Commission review.

While a violation of the Shipping Act, 1916, is not specifically alleged in support of complainant's petition, it appears from the nature of the complaint that the claim for refund relates to the requirements of Section 18(b)(3) which prohibits the assessment of rates and charges other than those specified in the carrier's tariff on file with the Commission and duly published and in effect at the time. It further appears that informal settlement of the complaint is considered by the carrier to be time barred by tariff Rule 16, entitled OVERCHARGES, which Rule places a limitation period of six months for the filing of claims described in the Rule. The merits of the complaint are therefore considered based upon these premises.

As noted in the complaint, the shipments here involved were previously the subject of a formal complaint (Docket No. 76-39) which was dismissed on jurisdictional grounds by Administrative Law Judge Glanzer by Initial Decision served September 30, 1976, after the filing of a joint Stipulation of Facts and Motion for Authorization to Settle. Dismissal of

[1] Both parties having consented to the informal procedure of Rule 19 of the Commission's Rules of Practice and Procedure (46 CFR 502.301-304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof. (Notice of determination not to review March 21, 1977).

the complaint did not restrict the complainant's right to resubmit its claim correcting the jurisdictional grounds defect found in Docket No. 76-39. The instant docket obviously is intended to accomplish this purpose.

The claim at issue involves a simple case of improper rate application wherein cargo described on the bill of lading as "Truck Engines, Diesel Engines Automotive for replacement" was assessed a different rate than that which is specified in the tariff as being applicable at the time. In lieu of a rate of $119.50 per cubic feet, which rate was assessed on the three shipments identified in the claim, the carrier's applicable United States/ South and East Africa Conference Southbound Freight Tariff No. 2, FMC No. 3, provided in Item 255, Second Revised Page 152, Correction 106, a base rate of $70.25 per 40 cubic foot or 2,240 pounds, which rate should have applied on the shipments in question.

Ordinarily this observation would warrant the issuance of an order directing that the overcharge of $1,633.66 be refunded to the complainant. In this instance however, such action would be redundant for the reason that a check in full settlement of the overcharge has in the meantime been paid by the carrier as confirmed in letter of November 12, 1976, submitted by attorney for the complainant.

While in ordinary circumstances, the carrier could be admonished for taking unilateral action in a proceeding before the Commission and thereby prejudging the decision which might be rendered, I find that from a regulatory standpoint, the conference tariff did not prohibit an informal settlement of the rate issue and there was, therefore, no legal necessity to bring the matter before this agency for formal resolution. This position is based upon the fact that an informal settlement of the claim was not time barred by Rule 16 of the tariff as the carrier apparently believed. A careful review of the Rule reveals that it does not extend to errors involving the mere misapplication of a rate, which is the issue in this Docket. It is noted that the rule could be phrased in a clearer manner by appropriately inserting the words "except as otherwise provided" in the first paragraph in order to alert a tariff user of the pertinent exception which appears in part (3) of the rule.

Following is a statement of the rule as it appears on pages 110 and 111 of the tariff:

OVERCHARGES

Claims for adjustment of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carrier in writing before shipment involved leaves the custody of the carrier. Any expenses incurred by the carrier in connection with its investigation of the claim shall be borne by the party responsible for the error, or, if no error be found by the claimant. All other claims for adjustment of freight charges must be presented to the carrier in writing

within six (6) months after date of shipment. The limitation of six months does not apply to U.S. Government or its agencies.

(1) For purpose of uniformity in handling claims for excess measurements, refunds will only be made as follows:

(a) Where an error has been made by the dock in calculation of measurements.
(b) Against re-measurements at port of loading prior to ship's departure.
(c) Against re-measurement by steamer's agent at destination.
(d) By Joint re-measurement of steamer's agent and consignee.
(e) By re-measurement of a marine surveyor when requested by steamer's agent.
(f) Re-measurement fees and cable expenses in all cases to be paid by party at fault.

(2) In cases of claims by shipper of overcharges in weight, certified invoice or weigher's certificate to be considered evidence of proper weight.

(3) Except those claims for obvious error in calculation or misapplication of rate or rate basis, all claims of adjustment in freight charges must be presented to the carrier in waiting within six months after date of shipment.

The assessment of a rate which differs from that which the tariff provides clearly falls within the exception provided in paragraph (3) above as it relates to "misapplication" of a rate.

CONCLUSION AND ORDER

I find that in view of the fact that the claim at issue has been properly settled between the carrier and the complainant subsequent to the filing of this Docket with this Commission, and in view of the fact that there is no tariff regulation or statutory provision which bars the parties from informally taking such action, a formal order with respect to this Docket is unwarranted. Complaint dismissed.

(S) RONALD J. NIEFORTH,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 366(I)

CATERPILLAR OVERSEAS, S.A.

v.

SPRINGBOK SHIPPING COMPANY, LTD.

NOTICE OF DETERMINATION NOT TO REVIEW

March 21, 1977

Notice is hereby given that the Commission on March 21, 1977, determined not to review the decision of the Settlement Officer in this proceeding served March 10, 1977.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 366(I)

CATERPILLAR OVERSEAS, S.A.

v.

SPRINGBOK SHIPPING COMPANY, LTD.

Dismissal of Complaint.

DECISION OF RONALD J. NIEFORTH, SETTLEMENT OFFICER[1]

By complaint filed October 15, 1976, Caterpillar Overseas, S.A. (complainant) alleges that Springbok Shipping Company, Ltd., (carrier) applied an incorrect rate on three shipments of "Engines and Parts, Viz: Automobile, Gasoline or Diesel and Parts, N.O.S." resulting in an overcharge of $1,275.89. It seeks refund of this amount pursuant to the informal procedure contained in Subpart S (46 CFR 502) of Commission's informal procedure for adjudication of small claims subject to discretionary Commission review.

While a violation of the Shipping Act, 1916, is not specifically alleged in support of complainant's petition, it appears from the nature of the complaint that the claim for refund relates to the requirements of Section 18(b)(3) which prohibits the assessment of rates and charges other than those specified in the carrier's tariff on file with the Commission and duly published and in effect at the time. It further appears that informal settlement of the complaint is considered by the carrier to be time barred by tariff Rule 16, entitled OVERCHARGES, which Rule places a limitation period of six months for the filing of claims described in the Rule. The merits of the complaint are therefore considered based upon these premises.

As noted in the complaint, the shipments here involved were previously the subject of a formal complaint (Docket No. 76–39) which was dismissed on jurisdictional grounds by Administrative Law Judge Glanzer by Initial Decision served September 30, 1976, after the filing of a joint Stipulation of Facts and Motion for Authorization to Settle. Dismissal of

[1] Both parties having consented to the informal procedure of Rule 19 of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof. (Note: Notice of determination not to review March 21, 1977.)

the complaint did not restrict the complainant's right to resubmit its claim correcting the jurisdictional grounds defect found in Docket No. 76–39. The instant docket obviously is intended to accomplish this purpose.

The claim at issue involves a simple case of improper rate application wherein cargo described on the bill of lading as "Truck Engines, Diesel Engines Automotive for replacement" was assessed a different rate than that which is specified in the tariff as being applicable at the time. In lieu of a rate of $119.50 per cubic feet, which rate was assessed on the three shipments identified in the claim, the carrier's applicable United States/ South and East Africa Conference Southbound Freight Tariff No. 2, FMC No. 3, provided in Item 255, Second Revised Page 152, Correction 106, a base rate of $70.25 per 40 cubic foot or 2,240 pounds, which rate should have applied on the shipments in question.

Ordinarily this observation would warrant the issuance of an order directing that the overcharge of $1,275.89 be refunded to the complainant. In this instance however, such action would be redundant for the reason that a check in full settlement of the overcharge has in the meantime been paid by the carrier as confirmed in letter of November 12, 1976, submitted by attorney for the complainant.

While in ordinary circumstances, the carrier could be admonished for taking unilateral action in a proceeding before the Commission and thereby prejudging the decision which might be rendered, I find that from a regulatory standpoint, the conference tariff did not prohibit an informal settlement of the rate issue and there was, therefore, no legal necessity to bring the matter before this agency for formal resolution. This position is based upon the fact that an informal settlement of the claim was not time barred by Rule 16 of the tariff as the carrier apparently believed. A careful review of the Rule reveals that it does not extend to errors involving the mere misapplication of a rate, which is the issue in this Docket. It is noted that the rule could be phrased in a clearer manner by appropriately inserting the words "except as otherwise provided" in the first paragraph in order to alert a tariff user of the pertinent exception which appears in part (3) of the rule.

Following is a statement of the rule as it appears on pages 110 and 111 of the tariff:

OVERCHARGES

Claims for adjustment of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carrier in writing before shipment involved leaves the custody of the carrier. Any expenses incurred by the carrier in connection with its investigation of the claim shall be borne by the party responsible for the error, or, if no error be found by the claimant. All other claims for adjustment of freight charges must be presented to the carrier in writing

within six (6) months after date of shipment. The limitation of six months does not apply to U.S. Government or its agencies.

(1) For purpose of uniformity in handling claim for excess measurements, refunds will only be made as follows:

(a) Where an error has been made by the dock in calculation of measurements.
(b) Against re-measurements at port of loading prior to ship's departure.
(c) Against re-measurement by steamer's agent at destination.
(d) By Joint re-measurement of steamer's agent and consignee.
(e) By re-measurement of a marine surveyor when requested by steamer's agent.
(f) Re-measurement fees and cable expenses in all cases to be paid by party at fault.

(2) In cases of claims by shipper of overcharges in weight, certified invoice or weigher's certificate to be considered evidence of proper weight.
(3) Except those claims for obvious error in calculation or misapplication of rate or rate basis, all claims of adjustment in freight charges must be presented to the carrier in waiting within six months after date of shipment.

The assessment of a rate which differs from that which the tariff provides clearly falls within the exception provided in paragraph (3) above as it relates to "misapplication" of a rate.

CONCLUSION AND ORDER

I find that in view of the fact that the claim at issue has been properly settled between the carrier and the complainant subsequent to the filing of this Docket with this Commission, and in view of the fact that there is no tariff regulation or statutory provision which bars the parties from informally taking such action, a formal order with respect to this Docket is unwarranted. Complaint dismissed.

(S) RONALD J. NIEFORTH,
Settlement Officer.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 508

INTERNATIONAL PAPER COMPANY

v.

GULF UNITED KINGDOM CONFERENCE

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

March 23, 1977

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission March 23, 1977.

It is Ordered, That applicant is authorized to waive collection of $2,440.73 of the charges previously assessed International Paper Company.

It is further Ordered, That applicant shall promptly publish in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 508 that effective May 28, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from May 28, 1976 through December 16, 1976, the rate basis for 'Paper Bags, Dunnage, Inflatable' was W only, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 508

INTERNATIONAL PAPER COMPANY

v.

GULF UNITED KINGDOM CONFERENCE

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298) and section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Gulf United Kingdom Conference (Gulf/U.K. or Applicant) has applied for permission to waive collection (on behalf of Sea-Land Service, Inc.) of a portion of the freight charges on a shipment of paper bags that moved from New Orleans, Louisiana via Rotterdam to Preston, U.K., under Sea-Land bill of lading dated December 1, 1976. The application was filed on January 31, 1977, with a re-submittal on February 14, 1977 which supplied verified signatures missing from the original filing.

The subject shipment moved under Gulf/United Kingdom Conference Tariff No. 38, FMC–17, page 94—9th revised, effective May 28, 1976, which governs shipments from U. S. Gulf of Mexico ports to ports in the United Kingdom. The aggregate weight of the shipment was 7,863 pounds. The rate applicable at time of shipment was $270 W/M, under the noncontract rate for paper bags, dunnage, inflatable. The rate sought to be applied is $270 per ton of 2,240 pounds (weight only), per Gulf/United Kingdom Conference Tariff No. 38, FMC–17, page 94—10th revised (correction No. 1089), effective December 16, 1976.

Aggregate freight charges payable pursuant to the rate applicable at time of shipment amounted to $3,388.50 plus handling and wharfage charges. Aggregate freight charges at the rate sought to be applied amount to $947.77 plus handling and wharfage charges. The difference sought to be waived is $2,440.73. The Applicant is not aware of any other shipment

[1] This decision became the decision of the Commission March 23, 1977.
[2] 46 U.S.C. 817, as amended.

of the same commodity which moved via Sea-Land or Gulf/U.K. during the same time period at the rates involved in this shipment.

Gulf/U.K. offers the following as grounds for granting the application:

(4) On May 18, 1976, the Gulf United Kingdom Conference made a temporary filing, by telex, to become effective May 28, 1976, as follows:

	Contract	*Non-Contract*
Paper Bags, Inflatable, Dunnage	$211.75 W	$249.10
Min. 18 WT per HH container	$105.00 W	$123.50

However, when the permanent tariff filing (7th Rev. Page 94) was issued, the rates were erroneously shown on a "WM" basis. This error was carried on the 8th and 9th Revised pages, and not corrected until 10th Revised Page 94, effective December 16, 1976.

Meanwhile, on September 20, 1976, a general rate increase became effective, and the above rates were increased by 8 ½%, rounded down to the next lowest 25 cents. 9th Revised Page 94 was changed to reflect the increased rates, but still incorrectly showed the rates to be on a "WM" basis, i.e.,

Paper Bags, Inflatable, Dunnage	$229.50 WM	$270.00
Min. 18 WT per HH container	$113.75 WM	$133.80

On December 1, 1976, International Paper Company shipped 7,863 lbs. (502 cu. ft.) of Paper Bags, Inflatable, Dunnage on a vessel of Sea-Land Service, Inc., and were assessed the non-contract rate of $270.00 WM, for total of $3,388.50, plus handling and wharfage charges. At the correct rate of $270.00 W, the freight amounts to $947.77, plus handling and wharfage charges. Sea-Land Service, Inc. therefore requests permission to waive collection in the amount of $2,440.73. International Paper Company concurs in this request.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 6(b), *Special Docket Application*, Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

Therefore, upon consideration of the document presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent inclusion of the symbol "WM" for "weight or measure" in the tariff, when only the symbol "W" for "weight only" had been intended.

2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Gulf/U.K. filed a new tariff which set forth the rate on which such waiver would be based.

4. The application was filed within 180 days from the date of the subject shipment.

Accordingly, permission is granted to Gulf/U.K. and Sea-Land Service, Inc., to waive collection of a portion of the freight charges, specifically $2,440.73. An appropriate notice will be published in the tariff of the Gulf/United Kingdom Conference.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
March 3, 1977.

TITLE 46—SHIPPING

CHAPTER IV—FEDERAL MARITIME COMMISSION

SUBCHAPTER A—GENERAL PROVISIONS

PART 502—RULES OF PRACTICE AND PROCEDURE

[GENERAL ORDER 16, AMDT. 18, DOCKET NO.76-61]

March 28, 1977

Miscellaneous Amendments

AGENCY: Federal Maritime Commission

ACTION: Final Rules

SUMMARY: Rules of Practice and Procedure are amended to authorize presiding officers to enter such order or rule as they deem proper when no answer to a complaint is filed within the time provided therefor, and to extend the time for filing answers; to permit the filing on the following business day when the two-year statutory limit for filing complaints seeking reparation expires on a Saturday, Sunday, or legal holiday; and to authorize presiding officers to order a hearing as well as the submission of additional evidence in proceedings conducted under the shortened procedure.

Effective Date: Upon publication in the *Federal Register*.

For further information contact:

Joseph C. Polking, Acting Secretary
Federal Maritime Commission
1100 L Street, N.W.
Washington, D.C. 20573
(202) 523-5725

Supplementary Information: The Commission instituted this proceeding by Notice of Proposed Rulemaking published in the *Federal Register* on November 23, 1976 (41 F.R. 227) to amend sections 502.64 (Rule 5(d)), 502.101 (Rule 7(a)), 502.181 (Rule 11(a)), and 502.184 (Rule 11(d)) of its

Rules of Practice and Procedure, 46 C.F.R. 502. The Maritime Administrative Bar Association (MABA) and Sea-Land Service, Inc. (Sea-Land)submitted comments which the Commission has carefully considered. A section-by-section discussion of the rules and comments follows.

1. Section 502.64 (Rule 5(d)). This section presently provides that only the Commission may enter an appropriate rule or order in the event that a respondent fails to file an answer to the complaint within the time provided. The rule further provides that only the Commission or the Chief Judge may permit the filing of an answer beyond the time permitted.

The amendment proposed would transfer this authority to presiding administrative law judges. MABA and Sea-Land support the changes. The need under the present rule to defer to the Commission or to the Chief Administrative Law Judge the issuance of necessary orders and rulings causes undue delays. The Commission recognizes the importance of expediting the hearing process so as to bring pending controversies to a prompt resolution. Any rule that acts to expedite such process while at the same time honoring the due process requirements is clearly in the public interest. The amendment to section 502.64 will accordingly be adopted.

2. Section 502.101 (Rule 7(a)). By deleting the reference to section 502.63 (Rule 5(c)), in section 502.101, as proposed, the method of computing time provided in section 502.101 would be made applicable to the computation of the two-year period for filing complaints seeking reparation under section 22 of the Shipping Act, 1916, 46 U.S.C. 821. This would permit the filing of a complaint on the next business day when the last day of the limitation period ends on a Saturday, Sunday, or legal holiday.

MABA and Sea-Land Service, Inc. oppose the amendment and maintain that the Commission lacks authority to adopt a rule which would result in an extension of time for filing granted by statute. Section 22 is silent on how the two-year period is to be computed. While MABA's and Sea-Land's argument may have some superficial appeal, it overlooks the fact that the present rule may in fact act to shorten the time within which reparation may be claimed, a result rejected by the court in *Kraft Foods v. F.M.C. and U.S.A.*, 538 F.2d 445 (D.C. Cir. 1976). Because the Commission maintains no facilities for the filing of documents on days when its offices are closed the rejection of a filing on the next business day when the limitation period ends on a Saturday, Sunday, or legal holiday, would result in shortening by one or more days the time provided in section 22 of the Shipping Act, 1916.

MABA suggests the addition to section 502.101 of a warning of possible subsequent adverse judicial construction of this statutory requirement should the amendment be adopted. While there is always the possibility that a court might overturn the rule adopted here, this is unlikely in view

of the fact that the method of time computation reflected in section 502.101 has been generally applied by the courts in their construction of periods of limitation found in other statutes. See *e.g., Sherwood Bros. v. District of Columbia,* 113 F.2d 162 (D.C. Cir. 1940); *Union National Bank v. Lamb,* 337 U.S. 38 (1949); *District of Columbia v. General Federation of Women's Clubs,* 249 Fed. 503 (D.C. Cir. 1957); *Dayton Power and Light Co. v. Federal Power Commission,* 251 F.2d 875 (D.C.Cir. 1958); *Wilson v. Southern Ry Co.,* 147 F.2d 165 (5 Cir. 1949). In any event, we believe that the "caveat" suggested is inappropriate. The suggestion is therefore rejected and the amendment will be promulgated as proposed.

3. Sections 502.181 and 502.184. The amendment to section 502.181 authorizes presiding officers to order hearings in proceedings conducted under the shortened procedure. Under the current rule while the Commission may order a hearing, the presiding officer has no such authority. MABA opposes giving the presiding officer authority to order a hearing "when none of the parties want it."

The amendment to section 502.184 authorizes presiding officers to order the submission of additional evidence. MABA maintains that the amendment is unnecessary as the presiding officer may now advise the parties that he considers the record insufficient and give them an opportunity to submit additional evidence "if they so desire" and may also rule against the party who has the burden of proof.

We see little merit to MABA's comments. The two amendments are aimed at correcting certain inconsistencies in the rules by giving presiding officers in proceedings conducted under the shortened procedure the same authority they have under section 502.311 (Rule 20) in proceedings for the formal adjudication of small claims. There is no rational basis for the disparity in these rules both dealing with complaint proceedings. As stated in our Notice of Proposed Rulemaking, the present limitation on the authority of presiding officers may cause unnecessary delay should the proceeding be remanded by the Commission for lack of sufficient evidence. The presiding officer should have the authority to conduct the proceeding in such a manner as will ensure a record adequate to support a decision in accordance with statutory requirements. We are therefore adopting the amendments of sections 502.181 and 502.184 as proposed.

Therefore, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553) and section 43 of the Shipping Act, 1916 (46 U.S.C. 841a), Part 502 of Title 46, Code of Federal Regulations, is amended.*

Effective Date. Inasmuch as the expeditious adoption of these rules is desirable and inasmuch as they are procedural in nature, they shall be

*The text of the amendment is reprinted in 46 C.F.R. 502.

effective upon publication in the *Federal Register* and shall be applicable to all pending and future proceedings.

By the Commission.*

(S) JOSEPH C. POLKING,
Acting Secretary

*Vice Chairman Morse dissenting.

I dissent in respect to deleting the words "except Section 502.63 (Rule 5(c))" from the first sentence of Section 502.101. See my dissent in *CSC International, Inc.* v. *Waterman Steamship Corp.*, Docket No. 75-31, Order on Remand, served October 15, 1976 (16 SRR 1510, 1512). Otherwise, I concur.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-13

PETITION OF NORTH ATLANTIC FRENCH ATLANTIC FREIGHT CONFERENCE AND NORTH ATLANTIC BALTIC FREIGHT CONFERENCE FOR A DECLARATORY ORDER

Section 14b(2), Shipping Act, 1916, is a notice provision and requires carriers and conferences of carriers to provide ninety days notice before increasing rates that are under their control.

Howard A. Levy for Petitioner the North Atlantic French Atlantic Freight Conference, and Petitioner North Atlantic Baltic Freight Conference, and the North Atlantic United Kingdom Freight Conference, North Atlantic Continental Freight Conference, North Atlantic Westbound Freight Association, Continental North Atlantic Westbound Freight Conference, Scandinavia Baltic/U.S. North Atlantic Westbound Freight Conference, South Atlantic-North Europe Rate Agreement, Continental-U.S. Gulf Freight Association, U.K./U.S. Gulf Freight Association, and the Europe Pacific Coast Rate Agreement.

John Mason and *Paul S. McElligot* for Sea-Land Service.

Peter G. Sandlund for the Council of European and Japanese National Shipowners Associations.

Stanley O. Sher for Iberian/U.S. North Atlantic Westbound Freight Conference, Marseilles-U.S.A. North Atlantic Freight Conference, Med-Gulf Conference, Mediterranean/North Pacific Coast Freight Conference, North Atlantic Mediterranean Freight Conference, and the West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference.

Elkan Turk, Jr. for the Far East Conference.

Leonard James and *David Nolan* for the Pacific Coast European Conference.

Donald S. Brunner and *Paul Kaller* as Hearing Counsel.

REPORT AND ORDER

March 28, 1977

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett and James V. Day, *Commissioners*)*

*Commissioner Bob Casey not participating.

This proceeding was initiated as a result of a petition filed by the North Atlantic French Atlantic Freight Conference and the North Atlantic Baltic Freight Conference requesting the Commission to declare the correct interpretation of the ninety day proviso of section 14b(2) of the Shipping Act, 1916. One carrier and 21 carrier conferences and associations have replied to the petition.[1] We heard oral argument.

POSITION OF THE PARTIES

Section 14b of the Shipping Act, 1916 authorizes the Commission to permit the use of dual rate contracts, provided, *inter alia*, that such cotracts contain certain express provisions. The provision required by clause (2) of section 14b, is that:

> . . . whenever a tariff rate for the carriage of goods under the contract becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in no case less than ninety days.

The North European Conferences (NEC)[2] take the position that there are three possible alternative interpretations of this requirement, *i.e.*, (1) that the carrier is only required to give the shipper ninety days notice of any increase in rates, covered by an exclusive patronage (dual rate) contract; (2) that a carrier need only maintain a contract rate in existence for ninety days, and thereafter may increase that rate without any notice to the dual rate contract merchant; and (3) that a carrier may increase a contract rate upon thirty days notice to the shipper, but only after that dual rate has been in effect for ninety days. Of these alternatives, only (1) and (3) are acceptable to NEC.

In the view of NEC, the second alternative, ninety days effectiveness, is untenable because Congress allegedly intended to provide dual rate shippers with a greater period of rate stability than shippers in nondual rate trades as a *quid pro quo* for their patronage agreements with carriers.

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[1] North European Conferences
- Associated North Atlantic Freight Conferences
  - North Atlantic United Kingdom
  - North Atlantic Baltic Freight Conference
  - North Atlantic/French Atlantic Freight Conference
  - North Atlantic Continental Freight Conference
  - North Atlantic Westbound Freight Association
  - Continental North Atlantic Westbound Freight Conference
  - Scandinavia Baltic/U.S. North Atlantic Westbound Freight Conference
- South Atlantic-North Europe Rate Agreement
- Continental-U.S. Gulf Freight Association
- U.K./U.S. Gulf Westbound Rate Agreement

Council of European and Japanese National Shipowners' Association (CENSA)
Pacific Coast European Conference
Far East Conference
Iberian/U.S. North Atlantic Westbound Freight Conference
Marseilles-U.S.A. North Atlantic Freight Conference
Med-Gulf Conference
Mediterranean/North Pacific Coast Freight Conference
North Atlantic Mediterranean Freight Conference
West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference
Sea-Land Service, Inc.

[2] The Far East Conference generally adheres to the arguments of NEC.

Therefore, it is argued that Congress could not have intended that dual rate shippers would have no notice at all of rate increases.

NEC urges the adoption of the third alternative, thirty days notice and ninety days effectiveness. NEC notes that Congress enacted sections 18(b)(2)[3] and 14b(2) of the Act at the same time, in Public Law 87–346, and points out that in the former section Congress expressly used the word "notice,"[4] while in the latter section Congress did not mention the word "notice." From that choice of words NEC concludes that Congress intended that a dual rate remain in effect for ninety days, but that, thereafter, the carrier could increase that rate upon thirty days notice.

Sea-Land Service, (Sea-Land) also advocates the third alternative on the theory that no other reading of the statute is permissible, for there is no ambiguity in the statute requiring an interpretation. Sea-Land asserts that section 14b(2) applies only to a rate that is in force and effect, and is not concerned with advance notice. Sea-Land is of the opinion that notice is provided for in section 18(b)(2) of the Act, and the two sections are to be read in conjunction with one another. Thus, it is argued that since section 18(b)(2) of the Act requires only thirty days notice of rate increases for noncontract shippers, if the Commission is to interpret section 14b(2) as a ninety days notice requirement, the Commission will find itself in a dilemma. The Commission will either be in a position of requiring that the carrier give non-contract shippers ninety days notice of rate increase rather than the statutorily permitted thirty days notice, or of permitting the spread between the contract rates and ordinary rates to exceed the 15% permitted by section 14b(7) of the statute. Sea-Land argues that to give non-contract shippers the same notice as is given contract shippers would eliminate the benefit flowing to contract shippers, which is the consideration for the promise of those contract shippers to give all of their business to the carrier.

Sea-Land believes the court erred in *F.M.C. v. Australia/U.S. Atlantic Gulf Conference*, 337 F. Supp. 1032 (1972),when it indicated that section 14b(2) required ninety days notice of rate increases.

The Iberian/U.S. North Atlantic Westbound Conference, and others,[5] (Iberian) jointly argue that section 14b(2) is a ninety day notice provision only and that a ninety day in effect rule is unduly harsh. Iberian argues that when section 14b(2) was added to the Shipping Act, 1916, rate increases were rare, so it did not matter whether section 14b(2) was an effectiveness provision or a notice provision. Because present day economic circumstances require frequent rate increases, a ninety day

[3] In pertinent part section 18(b)(2), Shipping Act, 1916, provides:

No change shall be made in rates, charges . . . which results in an increase in cost to the shipper . . . except by the publication and filing . . . of a new tariff . . . which shall become effective not earlier than thirty days after the publication and filing thereof with the Commission. . . .

[4] The word "notice" does not appear in section 18(b)(2) of the Shipping Act, 1916.

[5] Marseilles-U.S.A. North Atlantic Freight Conference, Med-Gulf Conference, Mediterranean/North Pacific Coast Freight Conference, North Atlantic Mediterranean Freight Conference, and West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference.

effectiveness rule would allegedly now have a detrimental impact upon carriers.

Iberian also points out that the Commission itself applying the intent of the Congress rather than the literal meaning of the words of the statute, held, in *The Dual Rate Cases*, 8 F.M.C. 16 (1964) that section 14b(2) was a notice requirement only.

Finally, Iberian notes that section 14b(2) requires that dual rate contracts approved by the Commission "expressly" contain the clause required by section 14b(2). Because none of the contracts approved by the Commission contain a clause requiring the contract rates to be in effect for thirty days before those rates may be increased, Iberian concludes that the Commission has clearly found section 14b(2) to be a notice provision only.

The Council of European and Japanese National Shipowners' Associations (CENSA) and the Pacific Coast European Conference (PCEC) substantially agree with Iberian. CENSA submits that the Commission correctly decided *The Dual Rate Cases* and should reaffirm that holding here. PCEC is of the same opinion. In this regard, PCEC would dismiss, as erroneous, the Commission's statement in *Surcharges at U.S. Atlantic and Gulf Ports*, 10 F.M.C. 13 (1965) that:

> Sec. 14b(2) itself does not require such notice. However, the Commission added the clause because of its recognition that many mercantile transactions require rate stability for at least ninety (90) days. 10 F.M.C. at 24, note 10.

PCEC submits that the Commission made it quite clear in *The Dual Rate Cases* that the Commission was not "adding" the ninety day notice clause, but was merely interpreting section 14b(2).

Hearing Counsel are of the opinion that section 14b requires that a dual rate remain in effect for ninety days before it may be increased, and then only upon ninety days notice of the increase. They argue that the Commission could not have ignored the words of section 14b(2) in *The Dual Rate Cases*, so the Commission could not have interpreted that section as being a notice requirement only, as it clearly is a *durational* requirement. In the view of Hearing Counsel, ninety days *notice* was an added requirement, imposed pursuant to section 14b(9).

Hearing Counsel point out that section 14b(6) of the Shipping Act permits the merchant to cancel a dual rate contract on ninety days notice to the carrier. They assert that, if the merchant receives only thirty days notice of a rate increase under the contract, even an immediate cancellation of the contract would bind the merchant to pay the increased rate for sixty days before the merchant could escape the obligations of the dual rate contract. Congress allegedly could not have intended that result. Therefore, according to Hearing Counsel, section 14b of the Shipping Act requires both ninety days notice and duration before a dual rate may be increased.

The National Industrial Traffic League (NIT League), urges the

Commission to reaffirm its holding in *The Dual Rate Cases* that ninety days notice of rate increases is required by dual rate contracts. NIT League argues that its members do not agree that dual rates may be increased within ninety days following the effectiveness of the original rate. The Commission also received identical telegrams from 11 shippers,[6] and a similar telegram from the Dupont Company.

DISCUSSION

Section 14b of the Shipping Act, 1916, in pertinent part, provides that the Commission shall permit the use of a dual rate contract if the contract:

> . . . expressly . . . (2) provides that whenever a tariff rate for the carriage of goods under the contract becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in no case less than ninety days; . . . [and] (6) permits the contract shipper to terminate at any time without penalty upon ninety days' notice. . . .

Section 14b of the Act was included in H.R. 4299, introduced in the House of Representatives in February 1961. As originally introduced in the House, clause (2) of section 14b read ". . . fixes tariff rates for the carriage of goods under such contract for a reasonable period, subject to approval by the Federal Maritime Board, but in no case less than ninety days. . . ."

Some of the witnesses testifying before the House Committee considering that bill interpreted the original language of section 14b(2) as requiring ninety days notice of rate changes. For example, James A. Dennean testifying on behalf of the Far East Conference stated:

> Regarding the requirements of H.R. 4299 that the contracts provide for a minimum of ninety days' notice of rate changes, our Far East Shipper's contract now provides for a minimum of 90 days' notice of rate increases, which is a minimum period of stability which we have found have been most satisfactory to the shipping public. *Hearings on H.R. 4299 Before the Special Subcommittee on Steamship Conferences of the House Committee on Merchant Marine and Fisheries*, 87th Congress, First Sess., at 270 (1961). (Hereafter *House Hearings*).

Donald F. Wierda of the American Steamship Committee on Conference Studies was unsure as to the import of that provision. He testified:

> The wording of this item suggests that the rates must be set without any change whatsoever for a period of at least 90 days, but very frequently in foreign commerce market conditions require exporters and importers to come to the conference for assistance in maintaining the market by reducing their rates during the contract period and very frequently such reductions are effected. . . . our position should not be made inflexible by a law of the United States. On the other hand, if this item 2 is intended to prevent any increases in rates unless adequate advance notice is given, then it is entirely reasonable. We feel that any shipper under a contract should be given adequate advance notice of any changes in the contract which might increase his landed cost and to permit him to revalue his position and to redetermine the advisability of maintaining his contract provision. *House Hearings* at page 70.

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[6] These shippers took the following positions:

> We endorse the position of the FMC in Docket No. 75-13. It is essential that we continue to have the protection available under the FMC interpretation in this docket if we are to meet our commercial obligations as American Shippers.

Most of the witnesses, however, read that provision literally, that is, requiring that the rate remain in effect for ninety days before the rate could be increased. For example, Grant Arnold on behalf of NIT League, after quoting clause (2), advised:

We are opposed to the provisions. . . .

The league previously suggested that carriers be required to give 90 days' advance notice of increases in rates.

[t]he League suggests changing proviso (2) to read: (2) Provides that applicable tariff rates and charges shall not be increased upon less than 90 days' notice. *House Hearings* at 281.

Likewise, Theodore Gommi of the National Association of Alcoholic Beverage Importers, referring to the ten conditions which the contract must meet in order to receive approval, stated:

We recommend that the second of these conditions be changed to require that no increase in tariff rates of the carriers be permitted without 90 days' notice of such a change. *House Hearings* at 411.

Alvin J. Shields on behalf of American Metal Climax, Inc., after quoting clause (2), remarked:

As that reads, it would mean that a rate cannot be made effective for less than 90 days and that a carrier, in order to meet, say some spot competitions, would be precluded from establishing a rate for a shorter period. . . . The question also arises as to what happens on the 91st day after a rate has been established. The day it is established it is good for 90 days' but on the 91st day the carrier is obliged to give only 30 days' notice of any change (sic) as covered by the proposed section 18(b)(2). We do not think that there should be a specific limit as to the period of effectiveness of any rate but simply a proviso in the bill that would require the carriers to give contracting parties at least 90 days' notice of a rate increase. *House Hearings* at 501.

As can be seen, only one witness understood that provision to be a notice provision. One witness was unsure of the import of the provision. The remainder of the witnesses understood it to be an effectiveness provision, and were opposed to such a provision and requested a ninety day notice requirement.

Another indication of the witnesses' understanding of the import of section 14b(2), as it was initially introduced, and the Committee members' intention in regard to that provision is found in a colloquy between Leonard James and the Committee in March 1961.

Mr. James began by asking the Committee to state the meaning of 14b(2). Counsel for the Committee responded, "That rate must be in effect for 90 days. It says so quite definitely, sir." *House Hearings* at 184. There ensued a discussion of the relationship of the notice provision of section 18 to the 90-day provision in section 14b(2). Mr. James said:

Under the provision of section 18, we would be required to give 30 days' advance notice to all shippers, whether contract shippers or not, of both increases and decreases; but the provision on page 2 [section 14b(2)] would require fixing tariff rates in conferences for a period of 90 days without any exception there. We have two different standards. *House Hearings* at 185.

Chairman Bonner responded:

Let me go back to the hearings that we held. It was persistently stated that, so as to aid our American commerce, rates could be given, an assured rate for 90 days or more, so that negotiations could be gone into be manufacturers for delivery of goods. *Id.*

Mr. James then stated:

We have no objection to giving a reasonable period of advance notice to contract shippers or to all shippers. *Id.*

Mr. James and the members of the Committee argued and concluded that 14b(2) as then phrased provided the rate period, *i.e.*, ninety days, while section 18 provided for the notice of increases, *i.e.*, thirty days, and that the two sections were not connected. Representative Mailliard gave his understanding of the intent of the Committee, as follows:

Mr. Chairman, I think Mr. James is right. I am not an attorney, but I think that the general provisions later on in the bill would not go to this section because this section is the detail under which the Board can approve these contract rates and I think that is binding regardless of what is in the other section of the bill; and I think inadvertently, because I do not think that is what we intended, the provision stands that you cannot change your rate upward or downward in less than 90 days regardless of what the Board says. *Id.*

Representative Downing concurred in that interpretation.

Upon being asked to state what suggestions he would make for alterations in the bill, Mr. James responded.:

Could we not perhaps get over that conflict there by amending section (2) to provide that, with respect to contracts, they shall afford to shippers not less than, let us say, reasonable notice of rate increases? *House Hearings* at 186.

The Committee suggested that, perhaps, as an alternative, section 18(b) could be amended in such a way as to apply to all sections of the bill. Mr. James argued that such an alteration would be inadequate. He explained:

That would not change my objection to it because, as I understand the provision on page 2, [section 14b(2)] that is a provision which has, as a matter of law, been fixed in all contracts and would require, as it says, tariff rates to be in effect for 90 days; and I think, if you are going to make any change in section 14 on page 2, you have to do it in that section right there. You have to make any proviso that apply there apply right there because, simply by changing the word "section" to "sections" you would refer to— *House Hearings* at 188.

Mr. James was cut off by the chairman, who suggested that making the word "section" plural would cause section 18 to apply to all sections of the bill. Mr. James denied that, asserting:

But these provisions, Mr. Chairman, do not apply to the contract. The provisions in section 18 have nothing to do with the contract that is concerned on page 2. [section 14b(2)]. *Id.*

Whatever the intention of the members of the Committee in March of 1961, the subsequent history of section 14b(2) seems to indicate that the Congress intended that a dual rate contract would provide for ninety days' notice to the merchant of any increase in the rates for goods carried under the contract. When the House Subcommittee reported out the dual rate bill they did so by introducing a clean bill, No. H.R. 6775. In that bill section 14b(2) read as follows:

(2) provides that, whenever a tariff rate for the carriage of goods becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased for a reasonable period, but in no case less than ninety days. . . .

That version of section 14b(2) passed the House, and, except for technical changes, passed the Senate and the entire Congress after conference.

In the Senate Hearings on the House Bill all witnesses characterized the new version of section 14b(2) as a notice provision. For example, Leonard James, then appearing for the Committee of European Shipowners, testified in reference to H.R. 6775:

Line 18, page 2 [section 14b(2)] requires each conference to give at least ninety days' notice of rate increases. *Hearings on H.R. 6775 Before the Subcommittee on the Merchant Marine and Fisheries of the Senate Committee on Commerce*, 87th Congress, First Sess., at 239 (1961). (Hereafter *Senate Hearings*).

Mr. James saw a distinction between the notice provisions of section 14b(2) and the notice provisions of section 18(b)(2) of the Shipping Act. In reference to the latter, Mr. James stated:

It should also be noted that rate control provisions differ even with respect to different classes of conferences and individual carriers.

For example, those using the contract rate system must give at least 90 days notice of rate increases to all shippers, contract or non-contract—page 2, line 22 [section 14b(2)]—while conference carriers and individual carriers not using the contract rate system need give only 30 days advance notice (page 9, lines 23, 24 (section 18(b)(2)). *Senate Hearings* at 249.

Matthew S. Crinkley on behalf of Isbrandtsen Co., in commenting upon the safeguards contained in H.R. 6775, testified:

Item (2), page 2 [section 14b(2)], requires at least 90 days' notice of any increase in freight rates, and since this is a period usually provided in conference contracts, it would appear this provision should not present too much of a problem to the conference lines. *Senate Hearings* at 533.

An identical interpretation was placed on section 14b(2) in H.R. 6775 by Barber Steamship Lines (*Senate Hearings* at 675); by James A. Dennean on behalf of the Far East Conference (*Senate Hearings* at 712); and by Lewis C. Paine on behalf of Amerind Shipping Corp. (*Senate Hearings* at 719).

The above testimony regarding section 14b(2) does not conclusively establish that the Congress intended that provision to be a notice provision. However, section 14b(2) does interact with another provision of section 14b, that is, the provision dealing with the termination of the contract.

Section 14b(2) now reads:

(6) permits the contract shipper to terminate at any time without penalty upon ninety days' notice. . . .

Section 14b(6) as it now reads, replaced three provisions originally contained in H.R. 4299. As introduced on February 15, 1961 those provisions read:

(6) permits the shipper to terminate without penalty if the carrier or conference increases rates or charges applicable to the cargo within the contract period; (7) permits the shipper to terminate without penalty where the other signatory is a conference of carriers and when the carrier or carriers that have customarily carried the major share of the shipper's cargo withdraw from the conference; (8) terminates without penalty at the end of the contract period unless affirmatively renewed. . . .

In his testimony before the House, Matthew S. Crinkley tied clause (6) of section 14b to clause (2) of that section. He stated:

I think that the provision here is alright. I would say that it could be that, in equal protection to the carriers and shippers, contracts could be canceled by either party on the same notice as required for rate increases, 90 days. Either party could cancel on 90 days' notice. That is the case with this upper provision [6] where you provide that, if a shipper does not accept a rate increase, he can cancel his contract. It could be tied to the same period. If some of the lines insist that 90 days is too much and 60 days ought to be the time, then the contract could be canceled on 60 days' notice. It could be against the provision for the rate increase. *House Hearings* at 357.

As it passed the House, and sent to the Senate as H.R. 6775, clauses (6), (7) and (8) had been combined and revised into the present clause (6) of section 14b.

Mr. Crinkley testified again in the Senate where he discussed section 14b(2) and section 14b(6) as they now appear in the statute. In reference to section 14b(6) Mr. Crinkley stated:

This section would permit the contract shipper to terminate his contract on 90 days notice—presumably without having to give a reason. I think this is proper especially when the contract carriers are required to give 90 days notice of a rate increase. To keep the matter in balance, if a shorter period of time is permitted for notice of a rate increase by contract carriers, then the contract shipper should be permitted to cancel his contract within the same notice period. *Senate Hearings* at 533.

Section 14b(2) of the Shipping Act also interacts, to some extent, with section 18(b)(2) of the Act. As indicated above, some of the witnesses before the House interpreted section 14b(2), as it was originally introduced in the House, as being a provision which fixed the tariff rates for a ninety day period. One of those witnesses, Edward Bransten, testifying on behalf of the Pacific Coast Coffee Association, discussed the interaction of section 14b(2) and section 18(b)(2):

Likewise, after the initial fixed rate period specified for dual rate agreements in item (2) on page 2 of H.R. 4299 [section 14b(2)], there is no provision in the bill for advance notice of changes in rates under dual rate agreements except the 30-day notice provision of paragraph (2) of section 18(b) on page 8 of the bill. This 30-day notice provision is required to afford shippers protection in all of these situations. *House Hearings* at 394–95.

However, in the Senate, after section 14b(2) and section 14b(6) had been changed to read substantially as they now appear, Matthew S. Crinkley saw the interaction of section 14b(2) and section 18(b)(2) differently.

I see no particular wrong in the requirement that 30 days' notice should be given as to increases. The contract would set up either 60 or 90 days as the notice period, but the people who don't sign a contract are also entitled to consideration, and there should be some notice period provided, especially if you have a group of lines that are acting in concert. *Senate Hearings* at 524.

Thus, Mr. Crinkley saw section 18(b)(2) as providing notice to non-contract shippers, while section 14b(2) provided notice to contract shippers.

As originally introduced, the bill clearly provided that the contract rates would be fixed for ninety days (section 14b(2)); and that *no* change in any rate could become effective until thirty days after that change had been publicly filed with the Commission, unless the Commission permitted the change to become effective in less than thirty days. Carriers and shippers appeared before the House Committee and complained that, by fixing the rates for ninety days, carriers would be precluded from granting to shippers a rate reduction urgently needed to permit the shippers to meet their competition. The carriers and shippers argued that even if the Commission was given authority to allow rates to become effective on less than thirty days notice, the carriers would be prohibited from granting the speedy reduction in rates to shippers necessary to meet spot competition, as the carriers and shippers expected that the Commission would not act expeditiously on the request for a short notice reduction.

It could be said that the changes subsequently made to section 14b(2) and section 18(b)(2) by the Committee were intended to meet these complaints by requiring thirty days notice for rate *increases* to non-contract and contract shippers under section 18(b)(2) and providing in section 14b(2) that no dual rate could be *increased* unless it was in *effect* for ninety days. There is a flaw in this reasoning, however, and it can be found in the changes made in section 14b(6) of the Act.

As originally introduced in the House, section 14b(6) permitted the contract shipper to terminate the contract contemporaneous with the effectiveness of any increase in a contract rate. Thus, if the contract rate had been in effect for ninety days, and thereafter increased upon thirty days notice, the contract shipper would be released from his obligations under the contract as soon as the increase in the rate became effective. However, when the House changed sections 14b(2) and 18(b)(2) to read substantially as they now read, the House also changed section 14b(6) to provide that the merchant could terminate the contract without any reason, but only upon ninety days notice to the carrier. As a result, if section 14b(2) is read as an *effectiveness* provision with notice provided in section 18(b)(2), then the merchant would be bound to the contract at the increased rate for at least sixty days after that increased rate became effective because he would be required to give ninety days notice of termination. While the Congress could have intended that the Commission would add a clause permitting the merchant to terminate the contract contemporaneous with the effectiveness of any increase, as the Commission has in fact done, there is no indication of any such intention in the legislative history. Moreover, it is unlikely that a House Committee so scrupulously attentive to the interest of contract shippers would have left so vital a point to administrative rulemaking.

The sounder interpretation of the 1961 changes to the Shipping Act,

1916, and the one which is more fully supported by the legislative history, is that section 14b(2) is a notice provision governing the filing of rates covered by a dual rate contract, and 18(b)(2)is a notice provision limited to the filing of non-contract rates. Such an interpretation is also consistent with the changes made in section 14b(6) of the Act.

Faced with complaints from the carriers that fixing rates for a period of time was undesirable, and that all that was required was adequate notice to the contract shipper, as had been the longstanding practice of the carriers in the dual rate contracts then existing; and complaints from shippers that a ninety day fixed period of effectiveness for a rate was inadequate protection to the shipper because on the ninety-first day after a rate had been established the shipper would receive only thirty days notice of any increase, the House changed its scheme and provided ninety days notice to contract shippers and thirty days notice to non-contract shippers. This interpretation is bolstered by the testimony, before the House and Senate Committees considering the bill, reading section 14b(2) as it was originally introduced in the House as a provision which fixed the contract rate for ninety days, but reading that clause as it passed the House to be a provision requiring ninety days notice of rate increases; and linking it to the notice required for termination as provided in section 14b(6). Although the testimony of witnesses before legislative committees does not conclusively establish the intent of the legislature in enacting a statute, the testimony regarding this statute carries greater weight than usual because at no time did the Committee members or staff disagree with the witnesses' reading of section 14b(2) as a notice provision.

Thus, although the legislative history of the dual rate law is not conclusive and would permit section 14b(2) to be read either as a notice provision or as an effectiveness provision, we interpret section 14b(2) as a notice provision.

In *The Dual Rate Cases*, 8 F.M.C. 16 (1964), we brought together, considered, and resolved all of the conflicting interpretations and desires of the many carriers and merchants participating in the enactment of the dual rate law. In *The Dual Rate Cases*, we required that all dual rate contracts provide for ninety days *notice* of rate increases. Hearing Counsel argue that the notice provision was added pursuant to our authority under section 14b(9) of the Shipping Act, wherein the Commission is authorized to require and permit such other clauses in dual rate contracts as are not inconsistent with section 14b. Hearing Counsel errs.

In our discussion of section 14b(2) in *The Dual Rate Cases*, we stated:

> Under the second numbered provision of section 14b all contracts must contain a provision which expressly: [here we quoted section 14b(2) of the Act].
>
> Read most literally, this provision of the statute would simply require that rates would not be increased more often than once every 90 days. However, numerous witnesses, both shippers and carriers, who testified before the Senate and House Committee during the consideration of H.R. 4299 and H.R. 6775 viewed this provision as requiring 90 days' *notice* of rate increases rather than the bare assurance that rates would not be increased more often than once every 90 days. It was recognized by these witnesses that

merchants offering goods for sale in our foreign commerce must know the ocean freight rate well in advance of shipment. A contract which merely assures the merchant that a rate which was increased today will not be again increased sooner than 90 days from today does not meet this need. With the passage of each day under such a contract the merchant has one day less for the planning of future sales and after the running of the initial 90 days the merchant is assured of nothing. It appears therefore the overriding intent of the statute and the reasonable requirements of our foreign commerce demand that merchants be given a minimum of 90 days' advance notice of increases in rates. This would seem a reasonable *quid pro quo* on the part of the conference for the merchant's exclusive patronage.

. . . In keeping with the legislative intent that the Commission should, insofar as possible, standardize dual rate contracts, we are requiring that all contracts include a uniform clause relating to provision (2) of section 14b. This clause, which is set out below, requires 90 days' notice of rate increases and includes the additional cancellation provision just discussed. [The provision whereby the merchant may terminate the contract if the carrier does not rescind the rate increase.] Rate increases necessitated by emergency conditions outside the control of the carriers are permitted under a separate contract provision which will be discussed below. *The Dual Rate Cases* at 27–28.

We thereupon prescribed the rate increase provision found in article 4 (a) of the Uniform Merchants Rate Agreement (UMRA), 46 C.F.R. 538.10. That article provides only for ninety days advance notice of rate increases, and does not require that the rate have been in effect for ninety days before a rate increase can be made effective.

Nowhere in *The Dual Rate Cases* or in the UMRA do we expressly require dual rate contracts to provide that a contract rate must have been in effect for ninety days before that rate may be increased. Clearly, we were interpreting section 14b(2) to be a notice provision, for we advised that the witnesses before the Congressional Committees ". . . viewed *this provision* as requiring 90 days' *notice* of rate increases rather than the bare assurance that rates would not be increased more often than once every 90 days." (first italics added) *The Dual Rate Cases* at 27. Thus, we elected to and did interpret section 14b(2) of the Shipping Act to be a notice provision and did not add that requirement pursuant to our authority under section 14b(9).

In September, 1966 we completed our consideration of the dual rate law by promulgating General Order 19, the conclusion of a rulemaking proceeding commenced in March of 1961. In that General Order we provided for the procedures governing the filing and approval of dual rate contracts, and for a uniform merchants rate agreement. In that General Order we brought together all of the provisions required in *The Dual Rate Cases* and the several changes, not relevant here, to those provisions permitted after the report in *The Dual Rate Cases*.

However, shortly before the promulgation of General Order 19 we decided the case styled, *Surcharge at U.S. Atlantic-Gulf Ports*, 10 F.M.C. 13 (1966). In a footnote in that case we wrote:

Sec. 14b itself does not require such notice [90 days notice]. However, the Commission added the clause because of its recognition that many mercantile transactions require rate stability for at least 90 days. *Surcharge* at 24, note 10.

Hearing Counsel cite that footnote as support for their contention that the Commission added the ninety-day notice requirement pursuant to its authority under section 14b(9) of the Act. That footnote, unimportant to the *Surcharge* case, is in error, for, as indicated above, in *The Dual Rate Cases* the Commission expressly found that section 14b(2) as requiring ninety days notice of rate increases, and no dual rate contract approved in *The Dual Rate Cases* contained a provision requiring that a contract rate be in effect for 90 days before the rate could be increased.

We have not been persuaded that our interpretation of section 14b(2) in *The Dual Rate Cases* was in error. On the contrary, our reexamination of the legislative history of section 14b(2), as discussed herein, supports our earlier finding.[7]

Thus, we conclude that the proviso in 14b(2) of the Shipping Act, 1916 which provides that a "tariff rate . . . under the control of the carrier or conference of carriers, [it] shall not be increased before a reasonable period, but in no case less than ninety days" is a notice proviso and no tariff rate under the control of the carrier shall be increased on less than 90 days notice to the contract shipper.

THEREFORE, IT IS ORDERED, That this proceeding be discontinued.

(S) JOSEPH C. POLKING,
Acting Secretary.

[7] The discussion herein is limited to the express issues set forth in our notice instituting this proceeding and nothing herein shall be construed to address any other matter.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 324(I)

CATERPILLAR TRACTOR COMPANY

v.

UNITED STATES LINES, INC.

ORDER ON REVIEW OF SETTLEMENT OFFICER'S DECISION

March 29, 1977

This proceeding was instituted by informal complaint filed by Ocean Freight Consultants (OFC) as assignees of Caterpillar Tractor Company against United States Lines, Inc. Complainant alleges that respondent has subjected Caterpillar to an ocean freight rate in excess of the properly applicable tariff rate. Respondent consented to the informal adjudication procedure but did not file an answer to the complaint. The Settlement Officer served his decision denying reparation. We determined to review.

DISCUSSION

The bill of lading pertaining to the shipment in question was prepared by Harper Robonson & Co., acting as agents for the shipper. It indicates that the shipment moved in two house to house containers loaded by the shipper. Further, the shipper's agent described the cargo as "manufacturer's parts for assembly," and also specified the applicable rate of $45.00 W/M under Tariff Item No. 8576[1] which refers to "Tractors and parts N.O.S. packaged." Freight charges assessed at $45.00 per 40 cubic feet amounted to $2,513.25.

OFC contends that in view of the description in the bill of lading the shipment should have been rated per Tariff Item No. 8586[2] which refers to "Tractor parts for assembly purposes (not replacement) packaged" at $57.00 per 2,240 pounds. Computed on that basis freight charges would amount to $1,818.20 or $695.05 less than collected by respondent.

The basic question for consideration is whether complainant has

[1] North Atlantic UNITED KINGDOM Freight Conference Tariff No. (47) FMC-2, 6th Rev. Page 182, effective October 24, 1972.

[2] Same tariff of rates as fn. 1. Subject to a minimum of 35,000 lbs. per container.

demonstrated that the lower rate is more properly applicable to the shipment in question.

In support of its claim OFC has submitted the bill of lading, a "Special Note," and certain sheets from the shippers "Master Invoice." A review of the "Special Note" and of the shipper's invoice sheets reveals the following:

The "Special Note" offered in lieu of an unavailable packing list is a statement prepared almost two years after the date of shipment (November 21, 1972—November 14, 1974). Written on plain white paper and signed "A.F. Mosher, Export Rate Analyst" it asserts that the shipment consisted of "Tractor Parts for Assembly." No mention is made of whether Mr. Mosher was at the time of the shipment and is now in the shipper's employ, nor does it say what is the source of Mr. Mosher's knowledge on this matter. We agree with the Settlement Officer that this provides little in the form of proof.

The shipper's invoice sheets, on the other hand, list various items identified by technical names and numbers sold by Caterpillar Tractor Company of Peoria, Illinois, to Caterpillar Tractor Company, Ltd., of Glasgow, Scotland. The Settlement Officer found the nexus between the invoices and the bill of lading insufficient inasmuch as the nexus consisted only of a handwritten notation number. Even assuming that the handwritten annotations were made at the time and truly reflect the dates the listed items were forwarded to respondent, there is no indication, nor can it be ascertained on the face of these invoices that they represent a complete list of what the two containers actually held.

In light of the foregoing we agree with the Settlement Officer's conclusion that the "Special Note" and the shipper's invoice sheets have little probative value. Conspicuously missing from OFC's attempt to prove its claim are copies of documents exchanged between shipper and carrier upon delivery of the cargo to the carrier such as export declaration. packing list and dock receipt. Such absence is especially significant inasmuch as the Settlement Officer by letter dated March 25, 1975, specifically allowed complainant to supplement the record to provide further ". . . evidence of what in fact was actually shipped. . . ." Complainant in reply to this letter furnished only the above-mentioned manufacturer's invoices and a further explanation that the evidence already submitted was ample.

Complainant's further explanation suggests that because Caterpillar manufactures tractors and the bill of lading describes the commodity as "Manufacturer's Parts for Assembly," the conclusion must be reached that the shipment consisted of "Tractor Parts for Assembly." Complainant argues that the word "Manufacturer" is synonymous with "Tractor" in this case. Unfortunately for complainant, Caterpillar is not synonymous with tractor. The decription in the complaint itself of the scope of Caterpillar's business shows that it is engaged in the manufacture of

equipment not limited to tractors. The description reads, ". . . earth moving machinery and material handling machinery and tools."[3]

As indicated above the shipper's agent prepared the bill of lading and specified the rate to be assessed. As the containers were loaded by the shipper and the bill of lading prepared by the shipper's agent, it is reasonable to presume, in the absence of proof to the contrary, that the agent knew the contents of the two containers and properly classified and rated the cargo. While we have held that the description on the bill of lading is not the single controlling factor in claims alleging misclassification of cargo, the evidence offered by OFC failed to rebut the presumption that the agent knew the contents of the containers when preparing the bill of lading and rating to cargo.

Complainant has also suggested that its claim should be treated as being established inasmuch as respondent did not reply to the complaint. The Settlement Officer was not persuaded by this argument. He stated that although statements may be uncontroverted they are not thereby taken as proved. He also expressed certain doubts about a previous Commission decision in *Ocean Freight Consultants v. Royal Netherlands Steamship Company*, Docket 72–39 Report on Reconsideration served January 30, 1975, which he apparently feared could be read as unqualifiedly standing for the proposition that unrefuted allegations are to be accepted as fact.

We agree with the Settlement Officer that failure of respondent to answer does not preclude examination of the proof by the Commission. As indicated by the Settlement Officer Rule 5 of the Commission's Rules of Practice provides at 46 CFR 502.64:

> In the event that respondent should fail to file and serve the answer within the time provided, the Commission may enter such order as may be just, or may in any case require such proof as to the matters alleged in the complaint as it may deem proper.[4]

Our previous decision in *Ocean Freight Consultants* is not inconsistent with this because in the former case the complainant was found to have sustained the burden of proof not only because relevant facts were unrefuted but because additional evidence supported those facts to the Commission's satisfaction. The former case is also distinguishable because it did not involve failure to file an answer but involved failure of respondent to deny certain of complainant's allegations *in its answer*. They provision of the Rules of Practice applicable to failure to deny is more emphatic as to what is deemed to be established. The rule reads:

> "Recitals of material and relevant facts in a complaint . . . unless specifically denied in the answer thereto, shall be admitted as true, but if request is seasonably made, a competent witness shall be made available for crossexamination on such evidence."

Accordingly, the Settlement Officer's concern about reconciling the

[3] Moody's Industrial Manual lists among Catepillar's prime products, pipe layers, tool bars, hydraulic controls, cable controls, industrial and marine engines, hydraulic excavators, compactors, and inertia welders.

[4] See our report in Docket 75-15 served January 5, 1977, as a recent example where the Commission examined the proof but further supported its conclusions by reference to Rule 5.

Ocean Freight Consultants case with burden of proof requirements is unwarranted.

In conclusion, we agree with the Settlement Officer that complainant has not satisfactorily demonstrated that an overcharge occurred and the claim for reparation is denied.

Vice Chairman Clarence Morse, concurring. I concur only in the result, but in so doing have the following observations.

We have here a not-uncommon situation where a shipper gives a generalized description of a shipment to its expert—the ocean freight forwarder—and the latter blindly utilizes that description when preparing the ocean bill of lading. There is no tariff commodity description covering "manufacturer's parts for assembly" but instead the forwarder applied the tariff's "Tractors and parts N.O.S. packaged" rate in extending the freight computations. Since the shipper's commodity description did not match the tariff commodity description, the forwarder should have contacted the shipper, explained the situation to it, and obtained the shipper's authorization to properly describe the shipment in the bill of lading to match the applicable tariff commodity description. In my opinion, the freight forwarder has failed in adequately exercising the degree of expertise which a shipper is entitled to receive from any licensed ocean freight forwarder.[5] If I were a shipper I would hold the forwarder legally liable for any loss suffered, or fire it, or both. Furthermore, I would initiate a proceeding to have a forwarder's license canceled if the forwarder has a pattern of such acts.

In this case the Commission gave claimant a "second bite at the cherry" for the purpose of enabling it to establish the true nature of the goods shipped. Surely we need go no further in attempting to comply with the directives of *Isbrandtsen Co., Inc.* v. *U. S.*, 96 F. Suppl. 883 at 892 (1951), aff'd per curiam, 342 U. S. at 950. Not only did claimant fail to produce such evidence, but it (and the majority) ignored the mandates of the tariff rules. Rule 3(f) (Tariff 2nd Rev. page 9) provides in part:

> (f) Description of commodities shall be uniform on all copies of the Bill of Lading and must be in essence in conformity with United States Export Declaration covering the shipment. Carrier shall verify the Bill of Lading description with the United States Export Declaration and request amendment of the Bill of Lading in the event of nonconformity with the United Staes Export Declaration. Amendments in the description on the Bill of Lading will only be accepted if in conformity with the United States Export Declaration or as supported by United States Custom House Form 7403. Trade names are not acceptable commodity descriptions and Shippers are required to declare their commodity by their generally accepted or generic common name.
>
> (g) If shipments are not covered by a Shipper's Export Declaration as permitted by Export Control Regulations, shippers must insert the applicable commodity Schedule B number in the Line copy of the Bill of Lading. . . .

[5] Section 44 (b) and (e), Shipping Act, 1916, as amended: 46 CFR 510.9 and 510.23.

See my dissent in *Carborundum Company* v. *Royal Netherlands*, Docket No. 75–15, served January 5, 1977.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 329(I)

JOHNSON AND JOHNSON INTERNATIONAL

v.

ROYAL NETHERLANDS STEAMSHIP CO.

ORDER ON REVIEW OF SETTLEMENT OFFICER'S DECISION

March 28, 1977

Settlement Officer James S. Oneto served his decision in this proceeding October 3, 1975 wherein he determined that complainant's claim for reparation on an alleged overcharge of ocean freight should be granted. We determined to review.

Upon review of the Settlement Officer's decision we are of the opinion that his conclusions are proper and well founded. We wish, however, to clarify one aspect of his decision and to further support the ultimate conclusion of his decision by reference to subsequent decisions of the Commission.

The Settlement Officer referred to our decision in *Ocean Freight Consultants* v. *Royal Netherlands Steamship Company;* Docket 72–39 Report on Reconsideration served January 30, 1975, as having modified if not overruled the decision in Dockets 303(F) and 304(F) *Johnson & Johnson International* v. *Prudential Grace Lines, Inc.* The latter case had been cited by complainant to support its claim. We find the Settlement Officer's statement to be misleading inasmuch as the *final* decision of the Commission in *Johnson & Johnson* is in fact totally consistent with the decision in *Ocean Freight Consultants* and could not have been overruled thereby because it was issued later in time. The decision that was modified, however, by *Ocean Freight Consultants* (and also by the later Commission decision in Johnson & Johnson) is the *initial* decision in Johnson & Johnson. We wish to clarify that it is the initial decision in Johnson & Johnson that was quoted by complainant and it is the initial decision to which the Settlement Officer was referring as being overruled.

Finally, it should be pointed out that in addition to the grounds mentioned by the Settlement Officer for not adhering to the "trade name"

tariff rule we have recently adopted other grounds for reaching the same conclusion. See Commission Reports in Docket 75–15—*The Carborundum Company* v. *Royal Netherlands Steamship Company* and Docket 75–27—*Abbott Laboratories* v. *Venezuelan Line*, both served January 5, 1977.

Vice Chairman Clarence Morse, dissenting. I dissent.

See my dissent in *Abbott Laboratories, Docket 75–27, supra.*

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 74–35

AGREEMENT NO. T–2880, AS AMENDED, ET AL.

DOCKET NO. 74–42

POUCH TERMINAL, INC.

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

ORDER ADOPTING INITIAL DECISION

March 31, 1977

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Ashton C. Barrett, Bob Casey, and James V. Day, *Commissioners*)

This consolidated proceeding began with a Commission Order of Investigation and Hearing (Docket No. 74–35) into the approvability of six exclusive terminal lease agreements executed in the summer of 1973 between the Port Authority of New York and New Jersey (Port Authority) and five different common carriers by water or terminal operators subject to the Shipping Act, 1916 (Act). Shortly thereafter, Pouch Terminal, Inc. (Pouch), which had initially lodged section 15 protests against the lease agreements, filed a section 22 complaint (Docket No. 74–42) against the Port Authority alone. Pouch claimed that the leases were implemented without prior FMC approval, alleged violations of Shipping Act sections 15, 16 and 17, and sought $3,500,000 in reparations.

The Initial Decision of Administrative Law Judge Stanley M. Levy (Presiding Officer) held that the lease agreements were subject to section 15 of the Act and met the standards for approvability enunciated by that section.[1] Although the Presiding Officer found that the proposed terminal rents would not cover the Port Authority's fully distributed costs

[1] The Presiding Officer did not approve Agreement No. T–2882 on the grounds that the parties no longer intended for the lessee to occupy Pier 12 (the Agreement covering Pier 12 is actually designated No. T–2881, however). Agreement No. T–2884 was approved on the condition that it be amended to reflect the fact that only Pier 2 and not Piers 1 and 2 were to be used by the lessee. Such an amendment (No. 8) has been filed with the Commission.

(including interest expense), he nonetheless concluded that the agreed upon amounts were basically fair and reasonable in light of the dwindling, highly competitive market for breakbulk cargo in the Port of New York. Pouch's complaint was dismissed, and no unauthorized implementation of the lease agreements was found to have occurred.

The Commission now has before it the "Exceptions to the Initial Decision" filed by Pouch and the "Replies to Exceptions" filed by the Port Authority, the lessees of nine Brooklyn Marine Terminal Piers owned by the Port Authority (Lessees), and the Commission's Bureau of Hearing Counsel.

Pouch argues that the Initial Decision is erroneous because: (1) economic adversity cannot justify a noncompensatory terminal lease; (2) there is no evidentiary support for finding the subject leases "fair" or "reasonable"; (3) there is substantial evidence of prior implementation of the lease agreements; and (4) there is substantial evidence that Pouch was harmed by the implementation of the leases.

After a careful review of the entire record, we have determined that these arguments were fully presented to the Administrative Law Judge and that his findings and conclusions thereon were well founded and correct. Accordingly, we shall adopt his decision as modified by the following supplemental findings and conclusions of our own.

SUPPLEMENTAL FINDINGS

The Port Authority entered into the following "minimum/maximum" pier rental agreements (Lease Agreements) for Brooklyn Marine Terminal facilities (Brooklyn Piers) in mid-1973:

1) No. T-2880, as amended, with Barber Lines A/S (Barber), for the exclusive use of Piers 9A and 9B at an annual rent of not more than $1,027,965 nor less than $513,982.50. Term of occupancy: September 1, 1973 until June 30, 1974 (10 months) and month to month thereafter. Barber's prior lease with the Port Authority for these facilities was to have continued until December 31, 1973. Piers 9A and 9B were declared Public Piers by the Port Commissioners effective January 1, 1974.

2) No. T-2881, as amended by T-2881-1, with Pittston Stevedoring Corp. (Pittston), for the exclusive use of Pier 12 at an annual rent of not more than $600,000 nor less than $300,000. Term of occupancy: August 1, 1973 until October 31, 1975 (27 months) and month to month thereafter. *This agreement was cancelled effective November 1, 1975 and Pittston no longer occupies or intends to occupy Pier 12.* Pittston's prior lease with the Port Authority for this facility was to have continued until April 30, 1975. Pier 12 was declared as Public Pier by the Port Commissioners effective May 1, 1975.

3) No. T-2882, as amended, with Pittston for the exclusive use of Pier 10 at an annual rent of not more than $514,855 or less than $257,428. Term of occupancy: August 1, 1973 until March 31, 1975 (20 months) and month to month thereafter. Pittston's prior lease with the Port Authority for this facility was to have continued until September 30, 1974. Pier 10 was declared a Public Pier by the Port Commissioners effective September 1, 1974.

4) No. T-2883, as amended, with Nippon Yusen Kaisha (NYK) and International Operating Corp. (ITO), for the exclusive use of Pier 7 at an annual rent of not more than $720,000 or less than $360,000. Term of occupancy: September 1, 1973 until June 30, 1977 (46 months). A prior NYK/ITO lease with the Port Authority for this facility was to

have continued until June 7, 1976. *Pier 7 has not been declared a Public Pier by the Port Commissioners.*

5) No. T–2884, as amended, with Universal Maritime Service Corp. (UMS), for the exclusive use of Pier 2 at an annual rent of not more than $431,050 or less than $215,535. Term of occupancy: May 1, 1973 until January 31, 1974 (9 months) and month to month thereafter. Piers 1 and 2 were both used by UMS between May 1, 1973 and July 31, 1973 at a proposed maximum rental of $1,086,550 (Agreement No. T–2884–6) and between August 1, 1973 and February 29, 1974 at a proposed maximum rental of $625,487.50 (Agreement No. T–2884–7). UMS's prior lease with the Port Authority for Piers 1 and 2 expired April 30, 1973, *but these facilities were not declared Public Piers by the Port Commissioners until October 1, 1973.*

6)No. T–2885, as amended, with UMS for Piers 4 and 5 at an annual rent of not more than $641,992 or less than $320,996. Term of occupancy: from month to month upon the expiration of UMS's prior fixed term lease with the Port Authority on December 31, 1973. Piers 4 and 5 were declared Public Piers by the Port Authority effective January 1, 1974.

Pittston's abandonment of Pier 12 and performance of all Brooklyn operations at Pier 10 increases the likelihood Pittston will handle sufficient cargo to make Lease Agreement T–2882–1 fully compensatory.

UMS' abandonment of Pier 1 and performance of all Brooklyn operations at Pier 2 increases the likelihood UMS will attract sufficient cargo to make Lease Agreement No. T–2884–7/8 fully compensatory.

The Port Authority did not bill the Lessees in accordance with the variable per ton charges stated in its public tariff (FMC Schedule No. PA–9), but instead sent monthly "on account" statements to each "mini-max" tenant in the amount of 1/12th the maximum proposed rentals with the understanding that these payments would be subsequently adjusted to reflect either the public tariff rates or the mini-max rates, depending upon the Commission's final decision herein. The "on account" statements also equaled the monthly charges under the previous long term written rental agreements the Lessees had had for the same facilities.

Except for Agreement No. T–2883 (NYK and ITO), the stated terms of the prior leases had expired long before the record was closed in this proceeding (January 1976). None of these prior leases were approved by the Commission.

Pittston, ITO and UMS have not always paid the Port Authority's monthly "on account" statements when due.[2] Over $1,500,000 in arrearages have accumulated since mid-1974, about $1,100,000 of it on Pittston's account. The Port Authority has not taken legal action to collect back rents from Pittston, ITO or UMS, but has requested payment by letter and telephone and has not excused the debt. Pittston has experienced serious financial difficulties since 1974.

Neither the proposed agreements nor the Port Authority's public tariff contain provisions for the extension of credit.

Pouch ultimately attempted to rent its three pier Staten Island facility at a flexible rate of $1.50 per ton, $0.50 less than the Port Authority's $2.00

[2] In the case of Pittston, extensions of credit in excess of 90 days apparently began under its preexisting leases for Piers 10 and 12.

per ton charge under the mini-max Lease Agreements. Neither Pittston's rejection of this offer nor Pouch's failure to attract other tenants at this rate can be attributed to the fact that Pittston's mini-max payments at Brooklyn Piers 10 and 12 might have been less than the Port Authority's fully distributed costs of owning and operating these piers. In August 1973, Pittston was renting the two Brooklyn Piers and all three Pouch Piers. Business slow downs forced Pittston to consolidate its New York breakbulk operations. It chose to consolidate at Brooklyn rather than at Pouch for a variety of legitimate business reasons, including previous difficulties in obtaining full contract performance from Pouch on matters such as dredging. The minimum cost of renting the two Brooklyn Piers under the Lease Agreements ($557,428) was *higher* than Pouch's initial offer to Pittston for a new lease on all three Pouch piers ($540,000).

SUPPLEMENTAL CONCLUSIONS

The burden of proof in this proceeding is upon Pouch and Hearing Counsel and the evidence adduced fails to establish that the Port Authority engaged in or is proposing anticompetitive, unduly preferential, or unreasonable practices. The Port Authority knew the mini-max rentals were unlikely to be fully compensatory at cargo levels projected for 1973 and 1974, but this fact alone does not support a finding that the Port Authority was purposefully engaged in a predatory price cutting scheme aimed at other breakbulk terminal operations within the Port of New York. Modernization of the Brooklyn Piers was completed by 1962 when the breakbulk business was strong. When breakbulk tonnages dropped unexpectedly between 1969 and 1974, the Port Authority, as the owner of these modern, relatively expensive facilities, could offer them at terms the breakbulk market would accept or close them down completely. We cannot fault the Port Authority's choice of the former course of action under the circumstances.

The amount of revenue actually realized under the mini-max leases will depend upon cargo volume. If the *maximum* level is reached, the Port Authority would cover its fully distributed costs. If only *minimum* rents are paid, the Port Authority would still net more income than it would be closing the Brooklyn Piers. Consequently, the users of other Port Authority facilities would not be required to unfairly "subsidize" the Brooklyn operations. See generally, *Matson Navigation Company—Reduced Rates on Flour,* 10 F.M.C. 145, 153 (1966); *Matson Navigation Company—General Increase In Rates,* 16 F.M.C. 96, 101–103 (1973). There is also no indication that any other person ever sought, what is more was denied, use of the Brooklyn Piers following the expiration of the preexisting leases. In fact, no person other than Pouch has come forward to complain of discrimination or preference of any kind. We conclude that the Lessees are not receiving special benefits unavailable to other New York breakbulk carriers or stevedores.

We realize the Commission has previously disapproved terminal practices under Shipping Act section 17, second paragraph, which did not recover fully distributed costs. *E.g., City of Los Angeles Agreements,* 12 F.M.C. 110 (1968); *Practices etc. of San Francisco Bay Area Terminals,* 2 U.S.M.C. 588 (1941); *Investigation of Free Time Practices—Port of San Diego,* 9 F.M.C. 525 (1966). As a general rule, all terminal users are expected to pay their own way. Nonetheless, "noncompensatory" is not synonymous with "unreasonable." Justifications can be and have been accepted for terminal tariffs or leases with noncompensatory features. *E.g., City of Long Beach and Transocean Gateway Corporation,* 13 F.M.C. 70, 74 (1969). There is sufficient justification present for the Port Authority's failure to charge rents which would assure the recovery of fully distributed costs in this instance. The Lease Agreements would be at least incrementally profitable, and, if implemented as month-to-month tenancies, would not bind either party to a particular level of rents for more than 30 days.[3] The low rental charges disapproved in *City of Los Angeles, supra,* and investigated in *San Francisco Port Authority and States Steamship Co.,*[4] were not distressed short term prices reasonably compelled by an oversupply of terminal space and declining market conditions, but were purely "promotional inducements" designed to attract long term business to a particular port.

Although the record offers no reasons for disapproving the mini-max concept or the particular charges proposed in the Lease Agreements, we cannot ignore the fact that the only basis for the Lessees' use of the Brooklyn Piers to date which was not violative of section 15 was under the Port Authority's Public Tariff and the parties have obviously not adhered to that tariff. None of the Lessees were charged in the amounts and in the manner specified by Tariff No. PA–9. The tariff contains no provisions for monthly "on account" billing with subsequent adjustments nor does it permit extensions of credit in the unusual amounts and periods which have been extended to Pittston, UMS and ITO. Moreover, in the case of Piers 1 and 2, UMS was allowed to continue its exclusive occupancy for five months after the prior lease expired before the Port Authority even declared those facilities to be public piers. This course of conduct represents at least a cooperative working arrangement which was not reduced to writing, filed and approved by the Commission as required by section 15 and constitutes a violation of that statute. It also represents a violation of section 533.3 of the Commission's Rules by the Port Authority.[5]

The section 15 violation by Pittston and the Port Authority has not proximately injured Pouch, however, and Pouch is not entitled to

[3] The term of the Lease Agreements is further discussed below.

[4] 14 F.M.C. 233 (1971). The terminal lease in that proceeding was ultimately found to recover fully distributed costs.

[5] Section 533.3 requires terminal operators to maintain tariffs on file with the Commission which show *all* rates, charges, rules and regulations pertaining to its terminal facilities. No violation of section 533.3 arose from NYK's and ITO's use of Pier 7 because that facility was not declared a public pier.

reparations from either party for any loss of revenues or diminution in property values it may have experienced since the first of Pittston's preexisting leases expired on September 30, 1974 (Pier 10).

A final matter requiring attention is the ambiguity created by the clause providing that the Lease Agreements shall be "ineffective" unless approved by the Commission, and the lapse of the specific time periods for the fixed rental terms provided by five of the six agreements.[6] If the mini-max leases were approved immediately it is now unclear whether the parties intend to begin occupancy under month-to-month tenancies or fixed term tenancies equal to the number of months originally stated in the Lease Agreements.

The original lease terms varied from between 3 to 46 months in duration for no apparent reason except that they were generally related to each Lessee's obligation under its preexisting Port Authority lease. A month-to-month tenancy, even if approved for an indefinite period, minimizes the tenant's ability to hold the Port Authority to a rental formula which may produce revenues below fully distributed costs and also minimizes the Port Authority's ability to hold a tenant at the Brooklyn Terminal should it receive a more attractive offer from some other terminal operator with a lower cost structure. Accordingly, we shall condition our approval of the Lease Agreements upon the parties amending them to specify that they shall run for an initial term of 30 days and from month to month thereafter.

Having this day adopted the Initial Decision of the Administrative Law Judge in the above-styled matters, as supplemented by the foregoing findings and conclusions, which Initial Decision is set forth in full as an Appendix to this Order.

IT IS ORDERED, That the Complaint of Pouch Terminal, Inc., is dismissed; and

IT IS FURTHER ORDERED, That the request for approval of Agreement No. T-2881-1 between Pittston Stevedoring Corporation and the Port Authority for the use of Pier 12 is dismissed as moot; and

IT IS FURTHER ORDERED, That Agreement Nos. T-2880-14; T-2882-1; T-2883-5; T-2884-8; and T-2885-11; are approved upon condition that:

A) The Port Authority, Barber Lines A/S, Pittston Stevedoring Corporation, International Terminal Operating Company and Nippon Yusen Kaisha, and Universal Maritime Service Corporation, modify numbered paragraphs 1 and 2 of their respective agreements to read as follows:

1. The letting under this Lease shall be extended to cover the period of May 1, 1977 through May 31, 1977, and shall continue from month to month thereafter as a periodical tenancy.

2. For the period commencing May 1, 1977, the Lessee shall pay a basic rental as follows: . . .

B) The Commission actually receives, on or before April 28, 1977, a complete copy of

[6] The UMS lease for Piers 4 and 5 (T-2885-11) has no initial fixed term.

the agreement, modified as required in clause (1) of this paragraph and signed by all parties thereto; and

IT IS FURTHER ORDERED, That the approval contained herein shall become effective on the date both the conditions set forth in the above ordering paragraph are met; and

IT IS FURTHER ORDERED, That if the conditions set forth in the third ordering paragraph are not met for either Agreement No. T–2880–14; Agreement No. T–2882–1; Agreement No. T–2883–5; Agreement No. T–2884–8; or Agreement No. T–2885–11; then the agreement or agreements not meeting said conditions are disapproved effective April 28, 1977. Commissioner Clarence Morse, dissenting:

The majority find section 15 violations existed in the manner of the Port's billing of charges to the terminal operators.

I find the weight of the evidence to be that neither the Port nor the terminal operators knew how the Pouch protest and complaint would be resolved by the Commission; and, therefore, they tried to deal with financial matters in a way which would not keep them floundering in the uneconomic situation and cash flow problems which the mini-max agreements resolved and yet would permit reverting back to another formula if the agreements were not approved.

At most the Port is guilty of billing the terminal operators not in accordance with its tariff, and the terminal operators willingly accepted the billing procedure because it both helped relieve a bad financial situation and helped them await an unknown commission decision. It stretches the evidence to the extreme to conclude that there were unfiled section 15 agreements in that course of conduct.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 74–35

Agreement No. T–2880, as Amended, et al.

No. 74–42

Pouch Terminal, Inc.

v.

The Port Authority of New York and New Jersey

Agreements Nos. T–2880, as amended, T–2881–1, T–2883, as amended, T–2884, as amended, and T–2885, as amended, are such agreements as encompassed by section 15 of the Shipping Act and subject to the jurisdiction of the Commission.

Agreement No. T–2882, as amended, is no longer operative and no regulatory purpose would be served by any determination relating to such agreement.

Agreements Nos. T–2880, as amended, T–2881–1, T–2883, as amended, T–2884, as amended, and T–2885, as amended, are not unjustly discriminatory or unfair to Pouch nor do they operate to the detriment of the commerce of the United States, nor are they contrary to the public interest and are not otherwise in violation of the Shipping Act, 1916.

Agreement No. T–2884, as amended, should be modified to reflect that UMS shall only use Pier 2.

The agreements should be approved.

The agreements have not been implemented prior to Commission approval.

The agreements do not subject Pouch to undue or unreasonable prejudice or disadvantage or establish unjust and unreasonable regulation and practices in connection with the receiving, handling, storing or delivery of property in violation of sections 16 and 17 of the Shipping Act, 1916.

The complaint is dismissed with prejudice.

Patrick J. Falvey, F. A. Mulhern, Albert B. Dearden, Arthur L. Winn, Jr., Samuel H. Moerman, and *Paul M. Donovan* for The Port Authority of New York and New Jersey, respondent.

James M. Leonard and *Martin J. McHugh* for Barber Lines A/S, Pittston Stevedoring Corporation, Nippon Yusen Kaisha Limited, International Terminal Operating Co., Inc., and Universal Maritime Service Corporation, respondents.

Seymour H. Kligler and *David R. Kay* for Pouch Terminal, Inc., complainant.

John Robert Ewers and *Martin F. McAlwee,* Hearing Counsel.

INITIAL DECISION OF STANLEY M. LEVY, ADMINISTRATIVE LAW JUDGE[1]

This consolidated proceeding[2] was instituted pursuant to the Commission's August 29, 1974, Order of Investigation under section 15 of the Shipping Act, 1916, and the complaint of Pouch Terminal, Inc. (Pouch), served September 17, 1974, alleging violations by the Port Authority of New York and New Jersey (Port Authority) under sections 16 and 17 of the Shipping Act, 1916, and involve certain lease agreements between the Port Authority and certain terminal operators and steamship lines for terminal facilities located at the Brooklyn Port Authority Marine Terminal.

The agreements involved herein are:

No. T–2880, as amended, with Barber Lines A/S (Barber);

No. T–2881–1 and T–2882, as amended by T–2882–1, with Pittston Stevedoring Corporation (Pittston);

No. T–2883, as amended, with Nippon Yusen Kaisha, Limited (NYK), and International Terminal Operating Company (ITO); and

No. T–2884, as amended, and No. T–2885, as amended, with Universal Maritime Service Corporation (UMS).

Agreement No. T–2880, as amended, between Barber and the Port Authority establishes terms and conditions for the exclusive use by Barber of Piers 9A and 9B at the Brooklyn Port Authority Marine Terminal. Under the terms of the Agreement, Barber is authorized to use the berthing areas adjacent to the pier facilities to berth seagoing vessels and other water-craft of designated companies; and, seagoing vessels of two other operators with the prior and continuing consent of the Port Authority. Further, Barber is subject to the general rules and regulations of the Port Authority's tariff (FMC Schedule No. PA–9) with the exception of the charges and fees set forth in the tariff. Under the payment provisions of the Agreement, Barber will pay the Port Authority on the basis of $2.00 times the revenue tons moving over piers 9A and 9B, but no less than $513,982.50 and no more than $1,027,965.

Agreement No. T–2881, as amended, between Pittston and the Port Authority establishes terms and conditions for the exclusive use by Pittston of Pier 10 at the Brooklyn Port Authority Marine Terminal. Under the terms of the Agreement, Pittston is authorized to use the berthing area adjacent to the pier facilities to berth seagoing vessels operated by persons for which Pittston acts as the stevedore or terminal operator and which has the prior and continuing approval of the Port Authority. Pittston is subject to the general rules and regulations of the Port Authority tariff (FMC Schedule No. 9A–9) with the exception of the charges and fees set forth in the tariff. Under the payment provisions of the Agreement, Pittston will pay the Port Authority on the basis of $2.00 times the revenue tons moving over Pier 10, but no less than $257,428 and no more than $514,855.

Agreement No. T–2882 as amended by Agreement No. T–2882–1 between Pittston and the Port Authority is no longer an operative agreement and Pittston has ceased to operate from Pier 12 under either a future lease agreement or under the Port Authority's public tariff.

Agreement No. T–2883, as amended, between NYK and ITO and the Port Authority establishes terms and conditions for the exclusive use by NYK and ITO of Pier 7 at the Brooklyn Port Authority Marine Terminal. Under the terms of the Agreement, NYK is authorized to use the berthing seagoing vessels owned or operated by NYK or by persons for which ITO acts as the stevedore or terminal operator. NYK and ITO are subject to the general rules and regulations of the Port Authority's tariff (FMC Schedule

[1] This decision became the decision of the Commission March 28, 1977.
[2] See order, served September 20, 1974.

No. PA-9) with the exception of the charges and fees set forth in the tariff. Under the payment provisions of the Agreement, NYK and ITO will pay the Port Authority on the basis of $2.00 times the revenue tons moving over Pier 7 but no less than $360,000 and no more than $720,000.

Agreement No. T-2884, as amended, and Agreement No. T-2885, as amended, between UMS and the Port Authority establish terms and conditions granting UMS the exclusive use of Piers 1 and 2 (T-2884) and Piers 4 and 5 (T-2885) at the Brooklyn Port Authority Marine Terminal. While Agreement No. T-2884, as amended, provides for the use of Piers 1 and 2 by UMS, the present understanding between UMS and the Port Authority is that Pier 1 will not be utilized by UMS pursuant to the Agreement.

Under the Agreements, as modified, between the Port Authority and UMS, UMS is authorized to only berth seagoing vessels and other watercraft in the berthing areas adjacent to Piers 2, 4 and 5 operated by persons for which UMS acts the stevedore or terminal operator and which has the prior and continuing approval of the Port Authority. UMS is subject to the general rules and regulations of the Port Authority's tariff (FMC Schedule No. PA-9) with the exception of the charges and fees set forth in the tariff.

Under the payment provisions of the Agreement, UMS will pay the Port on the basis of $2.00 times the revenue tons moving over Piers 2, 4 and 5, but no less than $312,743.75 and no more than $625,487.50 for Pier 2 and no less than $320,996 and no more than $641,992 for Piers 4 and 5.

It is the position of Pouch that:

1. The rental formula contained in the Agreements is not compensatory, i.e., it fails to provide the Port Authority with sufficient revenues to meet the Port Authority's expenses applicable to the demised premises;

2. the Port Authority knew the rental formula would not be compensatory when it offered such formula to its tenants;

3. nevertheless, the Port Authority put said rental formula into effect without Commission approval, in violation of section 15 of the Act;

4. the Port Authority's actions were a substantial factor inducing Pouch's tenant, Pittston, to remove operations from Pouch's piers to the Brooklyn Marine Terminal and a substantial factor in depriving Pouch of other tenants to replace Ptttston;

5. the Port Authority's acts violate sections 15, 16 and 17 of the Act;

6. Pouch has lost rental income and the value of its property has been greatly reduced as a result of the Port Authority's illegal acts, and it is therefore entitled to damages pursuant to section 22 of the Act in the amount of $3,500,000.

To be determined, therefore, are:

Whether the leases listed "are agreements subject to Section 15 of the Shipping Act, 1916, and, if so, whether said Agreements should be approved, modified, or disapproved pursuant to Section No. 15 of the Shipping Act, 1916";

Whether the Port Authority, as Pouch alleges in its Complaint, violated sections 16 and 17 of the Shipping Act, 1916 by entering into the subject Agreements; and

Whether these Agreements subject Pouch Terminal, Inc. "to undue or unreasonable prejudice or disadvantage or establish unjust and unreasonable regulations and practices in connection with the receiving, handling, storing or delivery of property in violation of sections 16 and/or 17 of the Shipping Act, 1916."

After the consolidation of this proceeding the Port Authority moved to discontinue the investigation and dismiss the complaint for lack of jurisdiction. Additionally, the Port Authority filed a motion requesting an evidentiary hearing limited to the issue of the Commission's jurisdiction. The other respondents (leasees) joined the Port Authority in these motions. I determined that the Commission possessed jurisdiction and denied the two motions. The Port Authority appealed by rulings to the Commission and, on March 14, 1974, the Commission denied the Port

Authority's motion to dismiss and motion for evidentiary hearing on jurisdiction; but also vacated jurisdictional determination. The Commission ordered that the investigation be expedited to resolve the jurisdictional and substantive issues set forth in the Order of Investigation.

Upon the completion of discovery, the hearing commenced on November 17, 1975, and ended on December 21, 1975. Witnesses sponsored by the Port Authority, Pittston, UMS, Pouch and Hearing Counsel gave testimony and some 71 exhibits were admitted into evidence.

FINDINGS OF FACT

1.The Port Authority is a public agency created by the States of New York and New Jersey and is the owner of, or retains property rights under long term leases for, marine terminal facilities located within a geographical area designated as the New York-New Jersey Port District.

2. The Port Authority owns 100 vessel berths in the Port District of which 24 are designed to handle container vessels, 10 are open berths designed to handle special bulk cargoes, e.g., lumber, scrap metal, automobiles, and 66 are designed to handle general break-bulk cargo and vessels. The Port Authority container berths constitute 24 of the 35 available container berths in the Port. Its break-bulk berths constitute 66 of the 107 available break-bulk berths in the Port. In 1974 the Port Authority's container and break-bulk berths handled over 72% of the liner service cargo in the Port.

3. The Port Authority is an "other person subject to this act" as defined in section 1 of the Shipping Act, 1916.

4. Historically, the Port Authority has made its marine terminal facilities consisting of piers, wharves, docks, sheds and buildings available to the respective users through the means of the Port Authority's published tariff (Port Authority Marine Terminals—FMC Schedule No. PA–9) or through lease agreements with the terminal operator or steamship line using any particular facility.

5. Barber operates as a common carrier by water in the foreign commerce of the United States pursuant to tariffs on file with the Federal Maritime Commission and is subject to the provisions of the Shipping Act, 1916.

6. Pittston conducts operations at terminal facilities in the Port of New York and in this capacity carries on the business of furnishing wharfage, dock and other terminal facilities in connection with common carriers by water. It is an "other person subject to this Act" as defined in section 1 of the Shipping Act, 1916.

7. NYK operates as a common carrier by water in the foreign commerce of the United States pursuant to tariffs on file with the Federal Maritime Commission and is subject to the provisions of the Shipping Act, 1916.

8. ITO conducts operations at terminal facilities in the Port of New

York and in this capacity carries on the business of furnishing wharfage, dock and other terminal facilities in connection with common carriers by water. It is an "other person subject to this act" as defined in section 1 of the Shipping Act, 1916.

9. UMS conducts operations at terminal facilities in the Port of New York and in this capacity carries on the business of furnishing wharfage, dock and other terminal facilities in connection with common carriers by water. It is an "other person subject to this act" as defined in section 1 of the Shipping Act, 1916.

10. Pouch is engaged in the business of renting out to common carriers by water and terminal operators three break-bulk piers and operating adjacent warehouse facilities which are located at Staten Island, New York.

11. For the most part, the Port Authority's facilities have been furnished to terminal operators and steamship lines under separate lease agreements rather than under the public tariff.

12. All users of the Port Authority's marine terminal facilities are subject to the Port's General Rules and Regulations contained in its published tariff whether the respective user is a party to a lease agreement or not. The primary distinction between a public user and a user under a lease arrangement relates to the manner in which the user is charged for the facility. If the user has a lease arrangement with the Port Authority, the charges are based on the terms set forth in the lease. If the user does not have the benefit of a lease agreement, the charges are those set forth in the Port Authority's public tariff.

13. While the Port Authority furnishes marine terminal facilities to vessel and terminal operators in the Port of New York, the Port Authority does not staff these facilities in the sense that the Port Authority provides labor for the handling of cargoes. The Port Authority purposely limits its operations to dredging and to repair and maintenance functions which are necessary to keep the facilities in satisfactory condition for vessel tie up and the handling of cargo. The users of the facilities provide the labor needed to load and discharge cargo. This labor consists of cargo handlers, coopers and checkers.

14. At the time the Brooklyn Marine Terminal facilties were constructed by the Port Authority in the mid-nineteen fifties as modern and efficient break-bulk piers, the Port Authority had little difficulty in furnishing these facilities to vessel operators, steamship agents and terminal operators under long-term fixed rental leases.

15. In the years prior to 1969, cargo and cargo-handling systems in the Port of New York were largely break-bulk in contrast to containerized cargo or methods. A tonnage survey conducted by the Port Authority in 1969 showed that of the approximately 25 million pay tons of cargo handled by vessels maintaining regular calls at the Port of New York, 16-1/2 million tons were being discharged and loaded on break-bulk vessels

and the remaining 8-1/2 million tons of cargo were being handled in containers.

16. While the 1969 projections indicated a substantial growth in container cargo so that by 1974 break-bulk and container cargo would be approximately equal, the shift to containerized cargo and vessels was much greater than predicated. Thus, by 1974, of the approximately 29 million pay tons of cargo handled in the Port of New York, 20 million tons were handled by container vessels and break-bulk vessels handled less than 9 million tons.

17. The decline of break-bulk cargo activity during the period 1969 through 1974 had an adverse impact on older and less efficient break-bulk facilities in the Port of New York which were not capable of accommodating modern break-bulk vessels and cargo handling techniques such as multiple-pallet loads, side-port operations, containers and special cargo movements.

18. The Port Authority's modern break-bulk facilities located at the Brooklyn Port Authority Marine Terminal also experienced a dramatic decline in use as a result of the growth of containerization. Illustrative of the marked decline in cargo passing over the Brooklyn facilities are the Port Authority's statistics comparing weight tons handled at the Brooklyn 1–12 for the year 1966 with those handled in 1972. In 1966, 2,070,000 weight tons were handled at the Brooklyn facility in contrast to 1,450,000 for the year 1972. During the same period, the weight tons that were handled at the Port Authority's Newark/Elizabeth facilities rose from $5,479,000 weight tons handled in 1966 to 10,256,000 in 1972.

19. In a declining break-bulk market, the modern and efficient design of the Brooklyn piers was no longer attractive to a single user under a long-term fixed sum rental arrangement.

20. The effects of the decline in break-bulk operations in the Port of New York, particularly for the Port Authority, became critical during 1972 with the increased disuse of break-bulk facilities and decline in break-bulk tonnages.

21. A study of the break-bulk industry and the problems arising from the decline in break-bulk tonnages in the Port of New York and its effect on the Port Authority was undertaken by the Port Authority during 1972.

22. This study by the Port Authority revealed:

(1) The shift of the large break-bulk carriers to containerized operations meant they were no longer interested in leasing piers for break-bulk operations and that this shift could cause the modern, high volume break-bulk pier to become vacant;

(2) Long-term fixed rent lease agreements were less advantageous to terminal operators since the decrease in large break-bulk lines left the terminal oprator with a fewer number of regular user or stable accounts and no incentive to risk a long-term lease at a fixed rental.

(3) The large steamship agencies which had in the past unified marginal break-bulk vessel operators were disappearing and were no longer prospects for a fixed time pier rental program. This left the terminal operator as a potential unifying entity but not

under a long-term fixed rental because the remaining break-bulk vessels which could be handled by a terminal operator have less regular schedules and levels of activity;

(4) Long-term fixed-sum rental arrangements were not attractive to the marginal break-bulk carriers operating in the Port on other than Port Authority facilities.

23. As a consequence of the study the Port Authority concluded:

(1) The more efficient and modern break-bulk facilities such as the Brooklyn Port Authority Marine Terminal facilities were required to meet the operational requirements of break-bulk carriers calling at the Port of New York. Less-efficient or smaller piers were inadequate.

(2) Attracting and retaining break-bulk cargo in the Port of New York depended on making the most efficient break-bulk facilities available to the break-bulk shipping industry upon terms which did not require a fixed rental over a fixed term.

(3) Unless the Port Authority devised a rental program that included a flexible rental structure, a flexible short-term arrangement, and a flexible labor stuffing practice, most of the tenants at the Brooklyn Port Authority Marine Terminal would not and could not renew their existing leases, could not compete with other ports for competitive cargo and would leave the Port of New York or go out of business.

24. As a consequence of its study the Port Authority, in December of 1972, formulated a new rental program based on a "mini-max" rental formula which in the Port Authority's judgment was the most viable means of retaining the break-bulk industry in the Port of New York.

25. The rental program the Port Authority formulated is primarily based on charging for the use of marine terminal facilities by the unit, rather than on a fixed rental. This allows the facility charges to fluctuate on the volume of cargo handled, subject to a maximum and minimum rent.

26. Each of the Agreements provide for a charge in an amount equal to $2.00 per revenue ton handled on the pier subject to a maximum and a minimum rent.

27. Prior to the summer of 1973 the Port Authority rented its piers at Brooklyn Marine Terminal to tenants pursuant to long-term, fixed-rental leasing arrangements. UMS was renting Piers 1 and 2 for an annual rent of $1,086,550 pursuant to a lease due to expire April 30, 1973, but to continue as a month to month tenancy thereafter; UMS was renting Piers 4 and 5 for an annual rent of $720,000 pursuant to a lease due to expire June 7, 1976; Barber was renting Piers 9A and 9B for an annual rent of $1,027,965 pursuant to a lease due to expire December 31, 1973, and continue as a month to month tenancy thereafter; Pittston was renting Pier 10 for an annual rent of $514,855 pursuant to a lease due to expire September 30, 1974.

28. Implementation of a usage charge or rent for marine terminal facilities based on the number of cargo units handled would place the terminal operator in a position, financially, to operate from large facilities by allowing the terminal operator to consolidate the cargo of smaller carriers into the large block of cargo needed to maximize the efficiency of the larger piers, particularly the Brooklyn Port Authority Marine Terminal piers, and would also reduce the risks arising from fixed overhead costs such as labor, inefficient operations, or loss of cargo.

29. The need to encourage and support a terminal operator to consolidate blocks of tonnage to justify the use of the more modern break-bulk Port Authority piers was particularly important at the Brooklyn Port Authority Marine Terminal Facilities since the physical configuration of the piers was suited to the piers being occupied by a single occupant. In contrast to the Brooklyn piers, Port Newark break-bulk facilities were the wharf type of facilities and were more easily subdivided between different users.

30. The principal purpose for establishing a substantial minimum rent was to induce the respective user of a Port Authority pier to confine its operations to a smaller number of piers and not to begin operating on two or three piers at a time without the required amount of cargo to make such an operation successful. The minimum rent requirement was designed to encourage as many carriers to use the Port as possible. For this reason, the Port Authority did not want to establish facility use charges for the piers solely on a revenue ton basis or on a tariff basis.

31. The flexible rent program based on the "mini-max" formula was to be implemented at the Brooklyn Marine Terminal by executing amendments to the lease agreements in effect with the current users of the facilities. These amendments would change the terms and conditions under which charges were assessed for the facilities from a fixed-sum per year charge to charges computed by multiplying the number of revenue tons moving over the pier in any one year by $2.00 with a maximum charge not to exceed the prior year's fixed sum payment and a minimum charge of not less than one-half the prior year's fixed sum payment.

32. The mini-max rental formula, based on a $2.00 a ton rate, was comparable to the prevailing charges at other terminals in the Port of New York and at other Atlantic ports and was responsive to the obligations and needs of both the Port Authority and the break-bulk industry in the Port of New York.

33. The minimum charge established by the Agreements between the Port Authority and the respective parties to the Agreements guarantees to the Port Authority an amount of revenue which is below the fully-distributed costs of the Port Authority allocated to each of the piers subject to the Agreements. The maximum charge established by the Agreements would exceed the fully-distributed costs of the Port Authority.

34. The Port Authority recognized that the level of revenue by the Agreements would not meet its allocated costs in the first year of operation. By the third year of operation the Port Authority expects the revenues which the Port Authority would receive under the payment provisions of the Agreements will equal or exceed these costs.

35. The Port Authority's rate of $2.00 a revenue ton is higher than the previous effective per ton rate at the Pouch facility or proposed effective rate at the Pouch facility.

36. The Port Authority's Brooklyn Marine Terminal facilities are

located in an area where there is available a large pool of skilled longshore labor.

37. Pouch Terminal is located in an area that does not have a large pool of skilled labor.

38. The Port Authority Brooklyn Marine Terminal facility is superior to any of Pouch's three piers for the loading and discharging of cargo from modern break-bulk vessels.

39. Pittston's operations at the Pouch Terminal became increasingly expensive and inefficient.

40. The cessation of the business arrangement between Pittston and Pouch was substantially caused by the obsolescense of Pouch's facilities the inability to obtain skilled longshore labor at the Pouch location.

41. The operational problems faced by Pittston at the Pouch terminals combined with the decline of the break-bulk market were the primary causes for Pittston shifting its operations to the Brooklyn facility.

42. Other terminal facilities operated by competitors of the Port Authority which possess the characteristics of a modern break-bulk pier will remain competitive despite the institution of a mini-max rental charge for the Port Authority's Brooklyn facilities.

43. The Port Authority's mini-max rental program will be available to all break-bulk operators at the Port Authority's break-bulk facilities in the Port of New York.

DISCUSSION

The Port Authority built various piers comprising the Brooklyn Marine Terminal during the six-year span between 1956 and 1962. At the time that the Brooklyn Marine Terminal was conceived the container revolution had not yet begun. Containerization, and the suitability or lack thereof of these piers to handle container traffic, was never considered by the Port Authority in building the piers.

Starting in 1965 and continuing through the present there has been, particularly in the Port of New York, a marked and radical change in the method by which ocean-borne cargo is transported and handled both on loading and discharge. Where, prior to 1965, general cargo was handled through traditional break-bulk methods, utilizing the services of skilled longshoremen and relatively simple mechanical aids, thereafter the radically new technological improvements represented by the container and its ancillary equipment became ever more pervasive.

Some indication of the dramatic change in the nature of the carriage of goods transported by water may be seen from the following tonnage figures:

In the year 1969 in the Port of New York some 16 1/2 million tons of cargo were transported in the break-bulk mode. In that year some 8 1/2 million tons were transported by container.

Five years later, in 1974, only 9 million tons were transported in the break-bulk mode while some 20 million tons of cargo passed through New York in containers.

This trend toward containerization appears irreversible.

The changes in the mode of maritime transport brought about by the container technological revolution have had serious repercussions in the stevedoring industry—particularly with regard to break-bulk stevedoring and terminaling. Prior to containerization there were some 54 stevedores engaged in break-bulk operation in the Port of New York. Today there are only 6.

Increasing containerization has whittled away, in another economic area, at the remaining break-bulk stevedoring and terminaling operations. It appears that practically all premium cargo today is transported by containers. What is left is lower valued cargo whose form does not particularly lend itself to transport by container. Thus, the business available to the break-bulk stevedore and terminal operator today represents the leavings of the container market. Another, and significant, result of this trend is that the break-bulk terminal operator can no longer rely on regular callings by scheduled liner operations. The break-bulk stevedore and terminal operator finds tramp ships as his customers more and more frequently and this has compounded the economic problems which afflict the industry. This problem has particularly affected those stevedores saddled with fixed term and fixed amount leases. If a stevedore and terminal operator cannot count on a regularized flow of traffic he experiences difficulty in being able to meet fixed rental obligations.

The plight of the stevedoring industry is illustrated by the fact that, as of 1972, UMS was suffering losses at the rate of 3 million dollars per year. One of the options faced by Pittston was the possibility of going out of business in the Port of New York. This danger was known to, and its gravity recognized by, many in the industry.

> It is clear that the outlook in 1972 and 1973 for increasing the total break-bulk tonnage in the Port District was most bleak and, in fact, most persons in the industry were predicting further reductions in break-bulk tonnage. It was the consensus that the effects of the container revolution and the consequent loss of break-bulk cargo was irreversible.[3]

With the decline of break-bulk volume another fact became obvious. There are far too many break-bulk piers in the Port of New York, many obsolete or obsolescent.

Faced with a depressed break-bulk economy the Port Authority concluded that the operational expenses attendant upon a proliferation of piers required drastic consolidation if break-bulk operation was to survive in the Port. Each separate pier maintained by a stevedore requires supervisory and operational personnel, irrespective of the labor force required on a day-to-day basis. The maintenance of large, fixed staffs, unrelated to the realities of the day-to-day flow of business was an economic burden which stevedores and terminal operators simply could not afford. Consolidation of facilities became imperative.

[3] Opening Brief of Pouch Terminal, Inc., p. 20.

It is useful to remember that the condition of which protestant, Pouch, herein complains—the empty condition of its piers—is not at all limited to Pouch. There are a number of piers comparable to Pouch's which are vacant and are faced with closing. In fact, the Port Authority, recognizing that its Erie Basin piers were not the equal of the Brooklyn Marine Terminal Piers, faced the obvious and realistic business necessity, and closed them down.

Similarly, UMS closed down its piers at Bush Terminal and paid rental elsewhere because its business was not sufficient to support a sub-standard break-bulk pier any longer.

In view of the depressed conditions of break-bulk traffic, the over-abundance of piers in the Port of New York and the increasing threat posed by the advancing technology of containerized transport of goods, only those piers with the physical capacity to serve an increasingly sophisticated break-bulk and semi-container traffic might expect to continue to be utilized. There is no question that the physical characteristics of today's break-bulk pier are extremely critical. As noted above, the Port Authority closed down piers which it considered to be marginal in efficiency or incapable of meeting the demands of advanced break-bulk shipping.

There is a trend to unitized and palletized cargo and other technologically sophisticated methods of handling break-bulk cargo. Then, too, it is customary in by far the greater number of cases for break-bulk ships to carry some containers. Thus, even when operations are conducted at a break-bulk terminal, that terminal must also have the capability to handle a small number of containers. It is for these reasons that few break-bulk piers are capable of meeting the requirements of today's break-bulk cargo handling. The record establishes that the Port Authority Brooklyn Marine Terminal piers represent the most modern and efficient break-bulk piers available in the Port of New York.

It is in the context of this background that consideration will now be given to the issues raised by the leases entered into by the respondents.

JURISDICTION

The Port Authority, supported by the leasees, contends that the leases are not section 15 agreements within the jurisdiction of the Commission.

They had previously moved to discontinue the investigation in Docket No. 74–35 and to dismiss the complaint in Docket No. 74–42 for the reason that the subject matter of the investigation and complaint is not within the jurisdiction of the Commission under the Shipping Act, 1916.

By ruling, served December 13, 1974, I denied the motion to dismiss for lack of jurisdiction, finding that the leases were such agreements as set forth in section 15 of the Act and that they must necessarily be filed with the Commission for its determination whether they should be approved, disapproved, or modified.

The parties appealed my ruling to the Commission, which by order, served March 14, 1975, determined that the ruling on the motion to dismiss was improvident and premature. It ordered that along with other substantive issues the question of section 15 jurisdiction should be resolved at a full hearing as well as any uncertainties as to the effect of the lease provisions.

In compliance with the Commission's order of March 14, 1975, the question of section 15 jurisdiction as well as any uncertainties as to the effect of the lease provisions was heard during the course of the hearing November 17–21,1975, as well as other substantive issues.

The testimony and arguments advanced during the hearing and on brief do not alter in any material way the analysis of the leases set forth at great length in my ruling of December 13, 1974. For all of the factual and legal reasons set forth in the ruling of December 13, 1974, it is concluded that, after hearing on the issue, the leases in issue in this proceeding are section 15 agreements within the jurisdiction of the Commission and all the parties to such agreements are carriers or other persons subject to the Shipping Act, 1916.

The factual and legal reasons set forth in the ruling of December 13, 1974, that the leases are subject to the Commission's jurisdiction, are incorporated herein and made a part of this decision as if set forth in full herein.

In determining whether the leases are section 15 agreements and subject to the Commission's jurisdiction we must also give consideration to Pouch's contention that the Port Authority and the lessees under the involved leases have implemented the leases prior to Commission approval. In support thereof, Pouch points out that the lessees have not fully paid the monthly lease billings submitted to them by the Port Authority and that the Port Authority has not gone to court to collect the unpaid rents. This, Pouch suggests, supports a finding that the parties have schemed to put the lease provisions into effect and have done so prior to Commission approval.

The leases here involved were signed in the fall of 1973, two and a half years ago. Since then, with the present proceedings pending and the respondents contending that the leases are not subject to section 15, there has existed great uncertainty as to the rents due the Port Authority, whether pursuant to the tariff or under the leases. If, as the Port Authoirty and the lessees contend, the Commission is without jurisdiction under section 15, then the leases have been effective throughout the two and a half year period since they were signed and the amounts due are as per the leases. In the meantime, with the leases expiring and shifting to month-to-month basis in most cases and certain of the facilities being declared public and tariffs being made applicable, other sums are due if the lease provisions do not take effect until approved by the Commission. Under such circumstances any delay in action for collection by the Port

Authority at the old lease rates are not indicative of an implementation of the new lease rates.

The Port has billed pursuant to the old leases and, where appropriate, the Port tariff. The matter is carried as an account receivable. If the Commission believes it appropriate it could even permit the new rates to have a retroactive effect.[4] In any event, the allegation that the parties have implemented an agreement prior to required approval cannot be sustained and it is not so found.

THE MINI-MAX FORMULA

Late in 1972 the Port Authority's representatives discussed with the entire industry, including the major stevedoring and terminal operators and break-bulk carriers within the Port District (including those who were not, as well as those who were its tenants), the possibility of the Port Authority adopting a new rent scheme. In December of 1972 a recommendation was made within the Port Authority's Marine Terminals Department to establish a new rental program. This program was discussed with all Port Authority tenants in Brooklyn and lease term extensions to the existing leases were offered as an inducement to put the program into effect on each of the Brooklyn piers at the earliest possible time, i.e., upon approval of the Port Authority Commissioners and upon the approval of the Commission.

Flota Mercante Grancolombiana at Pier 3 and Maersk Line (Brigantine Terminal Corp.) at Pier 11 declined to accept the new program because they did not care to extend the terms of their leases.

In the fall of 1973 the Port Authority and certain of its tenants at Brooklyn Marine Terminal, that is, UMS, ITO–NYK, Barber and Pittston, each signed amendments to their existing leases for Brooklyn Marine Terminal piers each of which amendments extended the terms of the existing leases and provided for a rental to be determined on the basis of the so-called "mini-max formula." Thus, the amendments provided that the UMS lease for Piers 1 and 2, then a month to month tenancy be extended to a fixed tenancy through January 31, 1974, and a month to month tenancy thereafter, the UMS lease for Piers 4 and 5, due to expire December 31, 1973, be extended to a month to month tenancy thereafter; the ITO–NYK lease for Pier 7, due to expire June 7, 1976, be extended to June 30, 1977; the Barber lease due to expire December 31, 1973, and continue as a month to month tenancy thereafter be extended to June 30, 1974, and continue as a month to month tenancy thereafter; the Pittston lease for Pier 10 due to expire September 30, 1974, be extended through March 31, 1975, and continue as a month to month tenancy thereafter; the Pittston lease for Pier 12 due to expire April 30, 1974, be extended to October 31, 1975, and continue as a month to month tenancy thereafter.

[4] *Mediterranean Pools Investigation*, 9 F.M.C. 264, 304 (1966); *Agreement No. T-2336—New York Shipping Ass'n*, Docket No. 69-57, 11 SRR 571, 473 (1970).

Each tenant's rent pursuant to the amendment would be determined by multiplying the number of revenue tons of cargo handled on the leased pier as defined in the amendments, by $2.00; but the maximum rent could not exceed the annual fixed rental set by the existing lease nor be less than one-half of such maximum rental. The Minimum and Maximum rents were set as follows:

	Minimum	*Maximum*
Piers 1 and 2	$543,275	$1,086,550
Piers 4 and 5	320,996	641,992
Pier 7	360,000	720,000
Piers 9A and 9B	513,982.50	1,027,965
Pier 10	257,428	514,855
Pier 12	300,000	600.000

Each amendment provided that it would not be effective until approved by the Commission.

Pouch contends that the minimum rental does not return sufficient revenue to recover fully allocable costs, is not compensatory and therefore is unlawful.

The record in this proceeding does indeed demonstrate that the Port Authority will be furnishing terminal facilities below its fully distributed costs. As a general rule, the Commission has required that terminal facilities be furnished at a rate no lower than the terminal owner's or operator's fully distributed costs in order to prevent unlawful discrimination to other ports or terminals, and to avoid jeopardizing the financial soundness of terminal operations. *Agreement No. T–2108 and T–2108–A*, 12 F.M.C. 110 (1968); *Agreement No. T–2227—Between the San Francisco Port Authority and States Steamship Co.*, 14 F.M.C. 233 (1971).

This rule finds support from the principle that public piers and marine terminals are considered public utilities for regulatory purposes since they are necessary to the business of supplying the shipping public with a service needed in the furtherance of the commerce of the United States and ocean carriers and the shipping public are dependent upon the economy, efficiency and soundness of terminal operations. *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525 (1966).

The Commission, however, in exercising its broad discretionary authority to determine whether the terminal practices or the actions generally of public port authorities are unlawful has accorded public port authorities discretion in making managerial decisions which affect port operations so long as the Port Authority has not acted unreasonably or contrary to the provision of the Shipping Act, 1916. *In the Matter of Agreement No. T–2598*, Docket No. 72–24, 14 SRR 573, March 21, 1975. Viewed in this light, the record herein establishes that the circumstances which prompted the Port Authority's decision to implement the mini-max rental agreements were compelling and should not be viewed as unreasonable or contrary to provisions of the Shipping Act, 1916.

As clearly revealed by the record, in today's conditions affecting break-

bulk stevedoring and terminaling in the Port of New York it would be unrealistic to believe that break-bulk piers could be rented at the rates and upon the terms and conditions suggested by Pouch. Mr. Costello of UMS in testifying to this effect said:

> If I am stuck with the fixed tonnage rental, let us say, and I only have 100,000 tons moving through a facility, I have to pay 700,000, I have to close the facility down. It just isn't there. The beneficial good from that ton is gone. It is gone to me, it is gone to the Port.[5]

The evidence herein reveals that the Port Authority's rental program as provided in the proposed leases was occasioned by the container revolution which caused a drastic reduction of break-bulk cargo traffic and services and resulted in a shrunken market for break-bulk terminal facilities.

With the industry facing an uncertain future and the consequent inability of tenants to pay rentals wholly unrelated to the volume of traffic handled, the Port Authority in an effort to prevent the demise of break-bulk service in the Port offered a lease program which offered the hope of survival for break-bulk stevedores and terminal operators. Mr. Termo of the Port Authority stated it thusly:

> Without flexibility so that the total rent can increase or decrease with volumes handled, the break bulk industry in the Port of New York could not survive and compete with other ports for competitive cargo.[6]

Although the minimum revenues would not be compensatory on a fully distributed basis, the evidence does support the conclusion that it is compensatory on an incremental basis. Applying the proposed rental to the actual tonnage moving over the piers in 1974 the revenues for the piers as a group, namely, Piers 2, 4 and 5, 7, 9A and 9B, 10 and 12, would aggregate $3,342,411. This exceeds all direct expenses, including allocations for overhead.[7]

The record shows that the $2.00 per ton charge proposed exceeds the charges of other pier landlords in the Port of New York and also at other ports on the Atlantic, Gulf and Pacific Coasts. To that extent it cannot be said that the Port Authority devised rentals to undercut and eliminate competitors. Rather, it is concluded that the proposed rentals are fair and reasonable when measured by general market conditions.

LAWFULNESS AND REASONABLENESS OF THE RENTAL CHARGES

The heart of Pouch's complaint, and at issue in this proceeding, is whether the mini-max formula for rentals results in an unjust or unreasonable practice or one otherwise discriminatory and unlawful.

The Port Authority, relying on *Union Pacific R. Co. v. United States*,

[5] Tr. 678.
[6] Ex. 9, p. 12.
[7] Exs. 25 and 35.

313 U.S. 450 (1941), contends that the evidence shows that the rentals proposed to be charged by the Port Authority under the involved leases constitute not less than the fair rental value of the properties involved, are in all respects reasonable, non-discriminatory and lawful and should not be disapproved by the Commission.

Union Pacific arose under the Elkins Act forbidding rebates, concessions or discrimination with respect to the transportation of property by railroad as covered by the Interstate Commerce Act (49 U.S.C. Section 41(1)). Dealing with subnormal rentals offered by the City of Kansas City, Kansas, to produce merchants for quarters in a municipal produce terminal, the District Court had ordered the City to assess rentals adequate to cover operating expenses and a "fair return" on the investment. The Supreme Court held this to be in error and decided that the highest rentals which the City might be required to assess should be determined by the standard of "fair rental value" rather than "a compensatory return." The Supreme Court said (pp. 473–474):

> Fair rental value rather than a compensatory return upon full value of the market facilities is the standard by which the City's schedule of rates is to be judged. To determine fair rental value, the going rates of rental for similar facilities in the community are significant, as are the rentals prospective tenants are willing to pay. Likewise, evidence of the over-all cost and the over-all value of the properties would be material. The cost of furnishing the facilities, including normal return on capital employed in like enterprises would have weight. Other pertinent factors would doubtless emerge in a controversy to have determined judicially whether certain rentals received are or are not fair. When enough evidence is offered to justify a conclusion based upon judgement and not guesswork, the requirements of the judicial process are met.

In line with the Supreme Court decision, the present record shows that the $2.00 per ton rental charge, proposed to be assessed under the involved leases, is as high or higher than—

(1) Similar rental charges for other marine terminal properties throughout the Port of New York;[8]

(2) Similar rental charges for marine terminal properties at other Atlantic ports ranging from Boston to Miami, at the Gulf ports of New Orleans, Mobile and Houston, and at the Pacific Coast ports of Los Angeles, Oakland and Seattle;[9] and

(3) The Port Authority Public Tariff No. P.S-9 charge at the Port of New York of $2.00 per ton.[10]

Pouch contends that in *Union Pacific* the Supreme Court also observed that the ICC could require that rentals equal costs where the ICC sought "to root out competitive evils in discriminatory warehousing indulged in by carriers in an effort to acquire traffic," 313 U.S. 450 at p. 474; see also *Baltimore & Ohio Railway Co. v. United States*, 305 U.S. 507, 523–524 (1939).

Pouch does not believe that any decisions dealing with the Elkins Act are applicable to the Shipping Act, 1916. It argues that the concept of "fair rental value" would seem to have little or no applicability to ocean

[8] Exs. 20, 21.
[9] Exs. 22, 23.
[10] Ex. 9, pp. 14–15.

terminal rents since ocean terminals are for the most part municipally-owned or operated. This makes many of the factors which determine "fair rental value" inapplicable to meet the kinds of problems peculiar to the rental of ocean terminals.

Even assuming that "fair rental value" is the applicable standard, Pouch asserts that the Port Authority has not demonstrated that its mini-max formula constitutes the "fair rental value" of its piers.

Pouch attempts to discredit the evidence of other pier rentals as set forth in Exhibits 20–23 by contending that the $1.95 rate shown therein for Pouch was determined by dividing the annual rental of $537,000 by the number of tons which moved across Pouch piers in 1972. However, says Pouch, since the annual rental was fixed, the rental of $537,000 would be paid even if only one ton passed over the piers.[11]

Pouch's argument is counter productive. If conditions in the Port were to deteriorate to the point where charges on an annual basis at Pouch terminal resulted in costs of $3, $4, or $5 a ton, would a charge of less than $3, $4 or $5 at Brooklyn thereby become unfair competition? Would competitors be required to continue to raise their charges per ton as volume declined at Pouch to avoid being charged with unfair competition? The very fact that a cost of $1.95 per ton at Pouch piers in 1972 resulted from declining volumes showed that from a leasee's point of view a rental at Brooklyn of $2.00 for a more modern facility made good business sense.

Pouch claims that the Port Authority charged cut-rate prices for its Brooklyn Marine Terminal piers. It arrives at this "cut-rate" conclusion by arguing that in establishing its mini-max rate, the Port Authority set a rate for its facilities which, according to its own computations, is about the same as that charged by its competitor, Pouch, a facility which the Port Authority claims is very much inferior to the Brooklyn Marine Terminal. It says that $2.00 is an irresistibly low rental and one with which Pouch could not compete. The testimony of the witnesses for the stevedores, however, is to the effect that Pouch could not compete at any price because operating difficulties, both physical and labor, could not be surmounted.

Despite Pouch's contention that the Port Authority could have extracted higher rentals and that the offer of $2.00 per ton was predatory and anti-competitive, the record cannot support such a conclusion. Neither the Port Authority nor Pittston drove Pittston's customers from Staten Island. The Commission cannot ignore the reality that by 1972 one-third of the break-bulk tonnage handled in the Port of New York had disappeared; that major break-bulk carriers had discontinued break-bulk operations; and that more and more break-bulk piers in the Port were being vacated and rendered empty and unused. With the disappearance of major break-bulk liner operations, the only remaining tenants for the

[11] See Pouch reply brief, p. 3.

break-bulk piers are the terminal operators who can combine in one pier operation the reduced break-bulk tonnages of a number of lines. But even as to these terminal operators, with the volume of traffic shrinking and the volume in the future most uncertain, it is reasonable to find that they could no longer assume long-term rental obligations which provided no flexibility for fluctuations in traffic or substantial reductions of traffic.

The level of the proposed rental charges, as well as the flexible minimax character of the formula, is found to be a reasonably fair charge which the tenants were able or willing to pay. Furthermore, the approach of the Port Authority, it is concluded, would provide the Port of New York with the best means of continuing break-bulk liner service to and from the Port in the face of a continuing decline in volumes and competition with other ports for the volume that remained.

The record also compels the conclusion that the continued vacancy of the Pouch piers since the termination of the Pittston lease must be attributed to general market conditions and not to the rentals proposed by the Port Authority. When the Port Authority has on hand 29 empty and unrentable break-bulk marine terminal berths, many of which are modern, it is not surprising that Pouch has a similar experience with its three older piers.

Mr. Chiarello, President of Pittston Stevedoring Corporation, testified that Pittston did not renew its lease of the three Pouch piers because, among other reasons, Pittston and its steamship customers did not need all three Pouch piers although Pittston was willing to negotiate a continued rental of one of the piers, Pier 19, and then only on a flexible rental which varied with the amount of cargo handled over the pier. However, Mr. Pouch insisted that any lease with Pittston should embrace all three piers. In addition, the physically obsolete and inefficient character of the Pouch piers, coupled with the chronic and long-standing labor problem at the Pouch piers, made the shift to Brooklyn necessary.

Mr. Chiarello testified that the Port Authority Brooklyn piers were physically attractive for his operations because:

> (1) They are modern and physically efficient piers in contrast to the antiquated and inefficient Pouch piers; and
>
> (2) there was a "rich pool of skilled and experienced longshoremen" in Brooklyn whereas Pittston had experienced "serious interference in operations from the inadequacy of labor available at the Pouch piers."

After describing the comparative advantages and disadvantages of operations on the Pouch piers as compared with the Port Authority-Brooklyn piers, Mr. Chiarello testified:

> Obviously the decision to lease any property for stevedoring purposes must involve the balancing of various economic factors. I may say that any differential in rate between that offered by Pouch and what would be charged to Pittston by the Port Authority on a public usage basis was of little relative significance. What were

significant, however, were the innate disadvantages inherent in the Staten Island operation, disadvantages which had proven themselves over the years.[12]

There is no doubt that the Pouch piers in Staten Island enjoy some physical advantages. For one, the existence of the warehouse facilities at the site does offer an advantage to a shipper who wishes to make use of both terminal and warehousing facilities; the physical proximity of the warehouses would, all other things being equal, offer an inducement to an interested carrier.

Then, too, the geographical location of Pouch on Staten Island offers ready access to vessels coming into New York Harbor. Once more assuming that all other things were equal, this location should offer a competitive advantage to Pouch in its effort to solicit customers.

The record reveals that the Pouch piers regrettably are obsolescent. Built in 1918 before the needs of today's break-bulk transport were developed, the Pouch piers in large measure cannot service the current carriers in an efficient and economic manner. The deficiencies of the Pouch piers were testified to by Mr. Chiarello, based upon Pittston's uninterrupted tenancy from 1955 to 1974.

The expert consultant hired by Pouch to inquire into the conditions, suitability and future use of the Pouch Terminal concluded that Piers 19 and 20 were wholly inadequate for modern break-bulk stevedoring and terminaling operations. Mr. Pouch conceded that Piers 19 and 20 were never equal to the piers at the Brooklyn Marine Terminal.

A difference of opinion did arise during the course of the testimony with respect to the physical efficiency of Pier 21. Mr. Pouch testified that he believed that Pier 21 (after it had been reconstructed subsequent to a fire) was the equal of the Brooklyn Marine Terminal Piers.

This contention was disputed by a former tenant of Pier 21, Mr. Chiarello of Pittston. He pointed out, that among other drawbacks, Pier 21 did not have sufficient unobstructed space to permit adequate maneuvering room. He said that there was little space in front for truck accommodation so that the operator was forced to bring trucks down the pier, an unwholesome and inefficient practice. All in all, Mr. Chiarello concluded, Pier 21, even after the modernization, was not the equal of the Brooklyn Marine Terminal Piers.

In this regard it is worth noting that despite the fact that Mr. Pouch believes Pier 21 to be the equal of the Brooklyn Marine Terminal, and despite the fact that he had devoted a year and a half to soliciting all marine interests in the Port as possible tenants of that pier, Mr. Pouch was unable to lease the pier at a rental at least 50 cents per ton lower than what was proposed to be charged by the Port Authority.

The testimony in this case establishes that the steamship lines calling at the Pouch Terminal and handled by Pittston all left Staten Island. Pittston still had a rental obligation for three piers. Pittston found it cheaper to

[12] Ex. 45, p. 12.

close down Pier 20 because the rental obligation owed by a terminal operator is only part of his costs; operational costs may be a far more significant factor. Mr. Chiarello testified that if Pouch Terminal were made available to Pittston—on a fully rent-free basis—Pittston would still have experienced a $700,000 operating loss. This was why Pittston decided to close down the pier even though obliged to continue to pay rent. Operating costs could more than offset any benefit derived from a cheap—even a free—rental.

The Pouch Terminal finds itself in a distressed economic condition. This is unfortunate and regrettable. That condition, however, fully corresponds to the equally distressed economic condition experienced by the break-bulk stevedoring and terminaling industry in the Port of New York. Pouch's customers and tenants are afflicted by the very same economic ills as is Pouch.

It cannot be found on this record that the economic detriment which has befallen Pouch can be attributed to any action by the Port Authority. Rather, we find that an obsolescent facility has been overtaken by the economic ills of the times.

MODIFICATION

Hearing Counsel interpose a single objection to approving the Agreements as drawn. Hearing Counsel contends that two of the agreements, Agreement No. T–2884, as amended, and Agreement No. T–2882, as amended, do not accurately reflect the understanding of the parties. The present understanding between the Port Authority and UMS is for UMS to use only Pier 2, not Piers 1 and 2 as reflected in the subject lease Agreement. The present understanding between the Port Authority and Pittston is that Pittston will not operate from Pier 12 under any circumstances. Thus, they say, Agreement No. T–2882, as amended, is no longer operative and its approval or disapproval is no longer an issue in these proceedings. Also, Agreement No. T–2884, as amended, should be approved conditioned on the Agreement being amended to reflect the present understanding of the parties.

The Port Authority is agreeable to this condition. It asserts that while Agreement No. T–2884 fully and accurately stated the understanding of the Port Authority and lessee UMS when made and submitted to the Commission, it is the desire of both parties now—over two years later—that the agreement be modified to terminate UMS' lease of Pier 1.

CONCLUSIONS

For all of the reasons hereinbefore set forth it is concluded that Agreements Nos. T–2880, as amended, T–2881–1, T–2883, as amended, T–2884, as amended, and T–2885, as amended, are such agreements as encompassed by section 15 of the Shipping Act, 1916, and subject to the jurisdiction of the Commission.

Agreement No. T–2882, as amended, no longer being operative, any conclusion as to jurisdiction and approvability thereof would serve no regulatory purpose.

For all the reasons hereinbefore set forth it is further concluded that the aforesaid agreements, excepting withdrawn T–2882, as amended, are not unjustly discriminatory or unfair to Pouch nor do they operate to the detriment of the commerce of the United States, nor are they contrary to the public interest and are not otherwise in violation of the Shipping Act, 1916.

It is concluded that Agreement No. T–2884, as amended, should be modified to reflect that UMS shall only use Pier 2.

For all the reasons hereinbefore set forth, the agreements, as modified, should be approved.

For all the reasons hereinbefore set forth it is concluded that the agreements have not been implemented by the parties prior to Commission approval.

For all the reasons hereinbefore set forth it is concluded that the agreements to not subject Pouch to undue or unreasonable prejudice or disadvantage nor establish unjust and unreasonable regulations and practices in connection with the receiving, handling, storing or delivery of property in violation of sections 16 and 17 of the Shipping Act, 1916.

For all of the reasons hereinbefore set forth the complaint is dismissed with prejudice.

(S) STANLEY M. LEVY,
Administrative Law Judge.

WASHINGTON, D.C.,
May 7, 1976.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 374(I)

SOKO HARDWARE

v.

Y. S. LINES

ORDER ON REVIEW OF DISMISSAL

March 30, 1977

This proceeding involves a request for reparation on alleged overcharges of ocean freight. The proceeding was discontinued by order of the settlement officer served February 28, 1977. The dismissal was based on a letter from complainant advising that the claim had been paid in full and requesting the complaint to be cancelled. By notice served March 15, 1977, we indicated our determination to review.

Our determination to review was prompted by the failure of the order of discontinuance to contain any discussion or findings on the question of whether settlement by payment in full results in payment of applicable tariff rates under section 18(b)(3) of the Shipping Act. While settlement of litigation is to be encouraged, it is our responsibility to assure that such settlements in matters involving section 18(b)(3) do not result in payment of charges for transportation which would not otherwise be permitted. To do otherwise could result in use of the Commission's offices to gain approval of inapplicable rates.

While the settlement officer in this proceeding no doubt was satisfied that the settlement was proper under section 18(b)(3), we think it preferable that, in the future, specific findings to this effect be incorporated in the order of dismissal. Upon our review of the record in this proceeding, we have determined that there is sufficient basis therein for permitting payment of the claim in full. Accordingly, it is ordered that proceedings in this matter be discontinued.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 488

COLLINS & AIKMAN EXPORT CORP.

v.

BARBER STEAMSHIP LINES, INC.

NOTICE OF ADOPTION OF INITIAL DECISION

March 28, 1977

No exceptions having been filed to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on March 28, 1977.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 488

COLLINS & AIKMAN EXPORT CORP.

v.

BARBER STEAMSHIP LINES, INC.

Application denied.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

Barber Steamship Lines, Inc., seeks permission to waive collection of a portion of the freight charges on a shipment by Collins & Aikman Export Corporation of 13,983 feet of carpet, from Newport News, Virginia, to Jedda, Saudi Arabia, under bill of lading dated May 27, 1976. The rate applicable at the time of shipment is alleged to be $144.00 W/M Plus 70% Congestion Surcharge. The rate sought to be applied is $88.25 W/M Plus 70% Congestion Surcharge, subject to a minimum of 300 revenue tons. This rate would have resulted in total charges of $52,118.69. Permission to waive collection of $7,881.31 is sought.

The application states that: "After shipper applied for rate which Carrier established in Private Tariff FMC-31, there was a falldown in production schedule which prevented delivery of minimum quantity (300 revenue tons) for the vessel."

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications,* Rules of Practice and procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and

[1] This decision became the decision of the Commission March 28, 1977.

eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[2] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[3] states the *Purpose of the Bill:*

[Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

A falldown in production by the manufacturer is not an error in a tariff of a clerical or administrative nature, nor an error due to an inadvertence in failing to file a new tariff.

Accordingly permission sought by Barber Steamship Lines, Inc., to waive collection of a portion of the freight charges, represented by $7,881.31 is denied.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
February 1, 1977.

[2] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*
[3] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges,* under *Purpose of the Bill.*

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 341(F)

THE FEDERAL MINISTER OF DEFENSE FEDERAL REPUBLIC OF GERMANY

v.

REPUBLIC INTERNATIONAL FORWARDING COMPANY
AND REPUBLIC VAN & STORAGE OF LOS ANGELES, INC.

ORDER DISMISSING PROCEEDING

March 22, 1977

On March 16, 1977 both the Complainant and the Respondent signed and filed a "Joint Motion of Complainant and Defendants for Dismissal of the Complaint." The Complainant has received full payment from the Respondents of the full amount demanded in the original complaint, and, as observed by the Commission in its recent March 1st Order, "we see no purpose to be served by their litigating the matters put at issue by the complaint."

Accordingly, and in view of the history of this proceeding, dismissal with prejudice (as requested by the parties) appears fully justified by the circumstances.

COMPLAINT DISMISSED, WITH PREJUDICE.

(S) THOMAS W. REILLY,
Administrative Law Judge.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 341(F)

THE FEDERAL MINISTER OF DEFENSE
FEDERAL REPUBLIC OF GERMANY

v.

REPUBLIC INTERNATIONAL FORWARDING COMPANY AND REPUBLIC VAN AND STORAGE OF LOS ANGELES, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

March 30, 1977

Notice is hereby given that the Commission on March 30, 1977, determined not to review the order of dismissal of the Administrative Law Judge in this proceeding served March 22, 1977.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75–24

INTERCONEX, INC.

v.

SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC.,
U.S. L INES, INC.

ORDER OF DISMISSAL

April 1, 1977

On June 5, 1975, Colt Industries (Colt) on its own behalf and as an agent for the Government of the Republic of Korea filed a complaint in Docket No. 75–19 against Interconex, Inc. (ICX), and Sea-Land Service, Inc. (Sea-Land), American Export Lines, Inc. (AEL) and U.S. Lines, Inc. (USL). In its complaint, Colt alleged that ICX, acting as a non-vessel operating common carrier by water (NVOCC), prepared 379 ocean bills of lading during the period of July 28, 1972 to February 5, 1975 on cargoes to be transported on vessels owned by Sea-Land, USL and AEL in which the cubic measurements and/or weights of Colt cargo shipped from United States ports to Korea were overstated. It was also alleged that, by reason of such overstated measurements and/or weights, ICX and the underlying carriers received compensation in excess of that provided for in their applicable tariffs, contrary to section 18(b)(3) of the Shipping Act, 1916 (Act). Colt sought reparation for Respondents in the amount of $500,000. ICX subsequently (July 11, 1975) filed a counterclaim for some $1,100.00 against Colt in Docket No. 75–19.

In response to motions filed by various parties, the Presiding Administrative Law Judge by Order served September 5, 1975, dismissed Colt's claim and ICX's counterclaim. By virtue of a negotiated settlement reached by Colt, the Republic of Korea and ICX, the parties did not appeal the Administrative Law Judge's dismissal.[1]

On June 24, 1975, ICX filed the complaint in this proceeding, *i.e.*,

[1] The underlying carriers (USL, AEL, and Sea-Land) were invited to become party to an overall settlement in which they would settle ICX's claims against them in Docket No. 75-24, discussed *infra*, as well as ICX and Colt settling their claims against each other. ICX and the underlying carriers, however, were unable to reach agreement.

Docket No. 75–24. In its pleadings ICX advised that it instituted this proceeding primarily to toll the two-year statute of limitation with respect to any claims that it may have against Sea-Land, AEL, and USL as a result of Colt's claim against it in Docket No. 75–19. Further, ICX stated that it considered its complaint in this proceeding to be "in the nature of a cross-claim against co-parties as authorized by Rule 13(g) of the Federal Rules of Civil Procedure", and requested that its complaint be consolidated with the proceedings in Docket No. 75–19.

Because of the similarity of the causes of action, ICX adopted Colt's complaint in Docket No. 75–19 and incorporated it by reference in the complaint filed in this proceeding. ICX alleged that "on information and belief", Respondents "will or may" be required to "indemnify" ICX and that they "are or may be liable" to ICX for "all or part" of any reparations ICX may be required to pay as a consequence of the complaint in Docket No. 75–19. ICX submitted that if Colt, a shipper, prevails in its claim against ICX, as a carrier, the same set of facts and case law will entitle ICX, as a shipper, to recover from the respondent carriers.

Respondents each have moved for the dismissal of ICX's complaint on the ground that it is procedurally and substantively deficient. ICX responded to each of the motions.

On August 11, 1975, Administrative Law Judge William Beasley Harris granted Respondents' motions to dismiss the proceeding in Docket No. 75–24. In so doing, he observed that ICX had filed no replies to Respondents' dismissal motions. When ICX explained to the Presiding Officer the clerical error which resulted in him not receiving copies of ICX's replies to Respondents' motions, the Presiding Officer entered an "Order Upon *Sua Sponte* Reconsideration of Order served August 11, 1975," wherein he took into account ICX's replies and reaffirmed his Order of August 11, 1975.[2]

ICX has now filed an appeal from the order of dismissal to which Respondents have replied. USL has also filed a second motion to dismiss ICX's appeal arguing that it is moot because Docket No. 75–19 has since been terminated.

USL's dismissal request is premised on the theory that because the Administrative Law Judge's dismissal of Docket No. 72–19 was not appealed, and subsequently became the decision of the Commission, and because Docket No. 75–24 is premised upon Docket No. 75–19, no regulatory purpose would be served by allowing Docket No. 75–24 to continue. USL believes that in view of the fact that ICX has incorporated

[2] On the day the Presiding Officer issued his *sua sponte* Order, ICX moved for reconsideration and oral argument with respect to the Order of August 11, 1975. The Presiding Officer did not address ICX's motion. However, since ICX, in its reconsideration request, made the same arguments as were in its reply to Respondents' motions to dismiss, we consider the *sua sponte* reconsideration order to be an adequate response to the arguments advanced by ICX on reconsideration.

by reference Colt's allegations in Docket No. 75–19, which allegations will now never be proven, ICX's appeal has become moot.

ICX, in reply, argues that the dismissal of Colt's complaint should have no bearing on its right to appeal. It would violate due process, contends ICX, for the Commission to treat its appeal as though it has never been filed; particularly because its complaint constitutes an independent cause of action. The proper approach, concludes ICX, is not to dismiss its complaint but, rather, to allow ICX to amend its complaint making clearer its independence from Colt's complaint. We disagree. We view ICX's complaint as a contingent claim based upon a set of circumstances which now cannot come about.

The complaint of ICX in this proceeding being "in the nature of a cross-claim" did not constitute a wholly independent cause of action but rather relied for its vitality upon the catalytic effect of a finding that ICX was liable to Colt Industries for assessing improper charges under the complaint filed in Docket No. 75–19. In the event of such a finding, then the claim of ICX, in theory at least, would come to life and any liability suffered by ICX would then *ipso facto* form the basis of ICX's complaint against the ocean carriers.

ICX itself in its appeal recognized the contingency of its claim when it advised that:

> . . . ICX has no reason to make any *unconditional* claim against the underlying carriers unless it is held liable to Colt . . . [emphasis original];

and, that:

> Possibly the Colt case against ICX will be decided in a way which renders the ICX complaint moot—in which case the ICX complaint can be dismissed or withdrawn.

The contingency — *i.e.*, a finding of ICX's liability in Docket No. 75–19 — failed, however when the claim of Colt against ICX was dismissed by the Presiding Officer and became the decision of the Commission. This dismissal of the underlying Colt complaint destroys the possibility of a finding of ICX liability in that proceeding which would give rise to any claim by ICX in this proceeding. Therefore, ICX has no claim as to which, under any set of circumstances, as framed, it would prevail. (*Investigation of General Rate Increase in the Domestic Guam Trade*, 7 S.R.R. 167 (1969)). In short, our determination here is a denial of ICX's appeal from the Presiding Officer's Order of Dismissal. We do so having thoroughly reviewed the ICX appeal. We see in our denial no deprivation of due process.

Our disposition of the overriding issue remaining in this proceeding makes unnecessary any ruling by us on USL's motion to dismiss ICX's appeal.

THEREFORE, IT IS ORDERED, That appeal of Interconex, Inc. from the Presiding Officer's Order of Dismissal is denied;

FURTHER, IT IS ORDERED, That the complaint of Interconex, Inc. is, dismissed with prejudice.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 490

FOOTNER AND COMPANY, INC.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

August 12, 1977

The Commission by notice served April 20, 1977, determined to review the Initial Decision of the Administrative Law Judge in this proceeding served April 5, 1977. Upon completion of review it has been decided that the Initial Decision of the Administrative Law Judge be adopted as the decision of the Commission.

THEREFORE, IT IS ORDERED, That applicant, Sea-Land Service, Inc., is authorized to waive collection of $525.00 of the charges previously assessed Footner and Company, Inc.

IT IS FURTHER ORDERED, That applicant shall publish promptly in its appropriate tariff, the following notice:

"Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket No. 490 that effective August 28, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from August 28, 1976, through September 18, 1976, the rate on 'ventilators, roof (non-mechanical)' minimum 22.5 m.t., for shipment, Elizabeth, New Jersey to Riyadh, Saudi Arabia was $210.00 w/m subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

IT IS FURTHER ORDERED, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 490

FOOTNER AND COMPANY, INC.

v.

SEA-LAND, INC.

April 5, 1977

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298), and section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Sea-Land Service, Inc. (Sea-Land or Applicant), has applied for permission to waive collection of a portion of the freight charges on a shipment of roof ventilators, which moved from Elizabeth, New Jersey, to Riyadh, Saudi Arabia, under a Sea-Land bill of lading dated August 28, 1976. The application was filed October 20, 1976.

The subject shipment moved under Sea-Land Service, Inc., Tariff 256–A, FMC–136, 4th revised page 81, item 755, effective August 31, 1976. The shipment measured 790 cubic feet (19.75 measurement tons of 40 cubic feet). The rate applicable at time of shipment was $210 W/M, with a minimum of 25 measurement tons per container. The rate sought to be applied is $210 W/M, with a minimum of *22.5* measurement tons per container. (Same tariff as cited above, except that the latter rate was published on 5th revised page 81, item 755, effective September 18, 1976.)

Aggregate freight charges payable pursuant to the rate applicable at time of shipment amounted to $5,250. Aggregate freight charges at the rate sought to be applied amount to $4,725. The difference sought to be waived is $525. The Applicant is not aware of any other shipment of the same commodity which moved via Sea-Land during the same time period at the rates involved in this shipment.

[1] This decision became the decision of the Commission August 12, 1977.
[2] 46 U.S.C. 817, as amended.

Sea-Land offers the following as grounds for granting the application:

(4) Sea-Land negotiated with Footner and Company for a rate to cover a movement of Ventilators, Roof, Non-motorized from Elizabeth, New Jersey. The negotiations were handled by Footner and Company, a freight forwarder, on behalf of Herschman and Poole. A rate of $210.00 W/M minimum weight 22.5 measurement tons was agreed upon (Attachment No. 1, page 6).

In passing the information to the rate analyst (attachment No. 2) the minimum weight was incorrectly transcribed as 25 measurement tons and the publication request (Attachment Nos. 3 and 4) reflects the incorrect minimum weight.

The forwarder realized the error and in his telex of September 15, 1976 (Attachment No. 5) informed our account representative Mr. Beilin that the charges billed were different from the charges as negotiated.

On September 17, 1976 the error in minimum weight was corrected by telex filing message 180 (Attachment Nos. 6 and 7).

Clerical error on Sea-Land's part in transmitting the wrong minimum weight to the tariff publications section was the cause of the erroneous publication effective August 31, 1976. A corrected publication was made promptly following disclosure of the initial erroneous publication.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 6(b), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in the tariff of a clerical or administrative nature, resulting from the inadvertent failure to file the negotiated rate with the proper minimum of 22.5 M.T. per container, as had been promised the shipper.

2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate on which such waiver would be based.

[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

4. The application was filed within 180 days from the date of the subject shipment.

Accordingly, permission is granted to Sea-Land Service, Inc., to waive collection of a portion of the freight charges, specifically the amount of $525. An appropriate notice will be published in Sea-Land's tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
April 5, 1977.

FEDERAL MARITIME COMMISSION

No. 73–27

CONSOLIDATED EXPRESS, INC.

v.

SEA-LAND SERVICE, INC., ET AL.

COMPLAINT DISMISSED

March 8, 1977

On February 14, 1977, I ordered complainant Consolidated Express, Inc. (Conex), to submit justification against dismissal of the complaint. See Order Requiring Complainant to Submit Justification Against Dismissal of Complaint. Briefly, I advised Conex that I could see no reason to retain this aged complaint case on the docket for a number of reasons relating to mootness, want of prosecution, other litigation, and lack of indication that the parties would either settle their differences or proceed to hearing.

In response to my ruling, Conex and respondent Seatrain Lines, Inc. (Seatrain), have submitted comments. Conex's comment takes the form of a request to withdraw the complaint without prejudice "in order to avoid litigation of matters which it appears may be resolved in other proceedings" but suggests that it may desire to use the record developed in this proceeding as part of any later Commission proceeding. See Complainant's Request to Withdraw Complaint Without Prejudice, March 1, 1977. By letter of the same date, respondent Seatrain requests that the complaint be dismissed *with* prejudice. Seatrain contends that the complaint was filed almost four years ago but Conex "has demonstrated a total inability to back up its complaint with evidence or to pursue its complaint to completion." Seatrain furthermore requests a finding that Conex has "totally failed in proof" on the merits of its complaint. Without detailed explanation, Seatrain requests this unusual action on the ground that it is a defendant in an unidentified antitrust case brought by Conex, cannot prevent the complaint from being dismissed, and somehow needs a finding on the merits.

As I explain below, I see no reason to continue this case on the docket. However, I find that Seatrain's requests for a dismissal with prejudice and for specific findings on the merits to be unwarranted.

As to the qustion of dismissing the complaint, I believe there can be little disagreement. As I explained in my ruling, cited above, this complaint case is now almost four years old and there are no signs whatsoever that Conex will proceed to hearing. Indeed, Conex indicates that it has chosen to seek whatever relief to which it believes it is entitled in another forum. As I noted in my ruling, furthermore, the practices of which Conex complained were ordered to be terminated long ago (September 18, 1973) and whatever viable issues which might have remained in the case were removed by Conex when it amended its complaint on September 9, 1976, to delete the claim for reparation.[1] The case therefore is essentially academic and at best would lead to a declaratory-order type decision establishing principles and guidelines governing the respective rights and duties of respondents under the Shipping and Intercoastal Acts. The need for even this type of decision is questionable, however, in view of the many decisions favorable to Conex already rendered in the courts, another agency, another proceeding before this Commission and in this proceeding as well.[2]

Failure to prosecute is, or course, recignized grounds for dismissal of a complaint. See Wright & Miller, *Federal Practice and Procedure:* Civil § 2370, p. 203; Federal Rule 41(b), 28 U.S.C.A.; *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962). This principle has been followed by the Commission. See, e.f., *The Tagit Co. v. Luckenbach Steamship Company, Inc., et al.*, 1 U.S.S.B.B. 519 (1935); *Isbrandtsen Co., Inc.*, 3 F.M.B. 543 (1941). Moreover, the Commission has expressed concern over the amount of time consumed in its proceedings, stating with respect to complaint cases particularly that "The Commission has a legitimate interest in seeing proceedings pursued to a conclusion and not languish on its docket for years while parties negotiate at leasure." Docket No. 74–11, *Rules of Practice and Procedure*, 14 SSR 923, 924 (1974). For similar sentiments expressed by the Commission, see Docket No. 75–36, *Miscellaneous Amendments*, 41 *Federal Register* 20585, May 19, 1976, and Docket No. 74–11, cited above, *Notice of Proposed Rulemaking*, 39 *Federal Register* 11117, March 25, 1974. Both for reasons of mootness and want of prosecution, then, this complaint should be and hereby is dismissed. This does not entirely dispose of the matter since Seatrain requests dismissal with prejudice and findings on the merits. As discussed below, however, I find Seatrain's requests unwarranted for several reasons.

As far as the issue of reparation is concerned, Conex has itself already succeeded in achieving a dismissal with prejudice. This occurred when Conex withdrew that portion of its complaint dealing with that issue. Since the practices of which Conex complained terminated as of September 1973, Conex is now precluded from filing a new complaint because of the two-year period of limitation prescribed by section 22 of

[1] This was apparently done because Conex has elected to seek damages in an antitrust action in the courts. See *Carnation Company v. Pacific Westbound Conference et al.*, 383 U.S. 213, 224 (1966).

[2] For a recitation of all of these cases and decisions, see my previous ruling, cited above, pp. 4, 5.

the Shipping Act, 1916, a non-waivable jurisdictional prerequisite. *U.S. Borax & Chem. Corp. v. Pac. Coast European Conf.*, 11 F.M.C. 451, 471–72 (1968), *Aleutian Homes, Inc. v. Coastwise Line*, 5 F.M.B. 602, 612 (1959).

As to the remaining issues in the complaint, I do not believe that the action requested by Seatrain, to wit, dismissal with prejudice and findings on the merits is warranted. I recognize that complaints have been dismissed with prejudice in proceedings before the Commission.[3] Nevertheless, such action, as one court has stated, is "a drastic sanction to be applied only in extreme situations." *Syracuse Broadcasting Corp. v. Newhouse*, 271 F. 2d 910, 914 (2 Cir. 1959). Dismissals with prejudice are therefore scrutinized very carefully and, if allowed, are done so for such things as a clear record of delay, contumacious conduct by complainant, or serious showing of willful default. See Wright & Miller, cited above, § 2369, pp. 193–198. Although there has been considerable delay in this proceeding, as I have noted in my previous ruling, cited above (pp. 2, 3), and elsewhere (see Motions to Dismiss Denied, 16 SRR 817, note 1), it has not all been attributable to complainant and I certainly would not find that complainant has been guilty of contumacious conduct or has been in willful default. Despite all the delay, furthermore, Conex had submitted a prepared written case by September 1975, which, although untested at a hearing, withstood motions to dismiss. See ruling, cited above, pp. 2, 3. Furthermore, Seatrain's very abbreviated letter is not very enlightening, much less persuasive as to other reasons why I should grant the extraordinary sanction requested.[4]

Postscript

Seatrain has followed its initial letter of March 1 with a second letter dated the next day in reply to Conex's suggestions that "the record herein could be made a part of any later Federal Maritime Commission proceeding involving the same parties and the issues herein."[5] Seatrain expresses concern over a possible revival of these issues at some distant time in the future when memories fade and knowledgeable witnesses

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[3] See e.g., *Ace Machinery Co. v. Hapag-Lloyd A.G.*, Order, 16 SRR 1531, note 1 (1976); this docket, Dismissal of Complaint in Part, August 2, 1974; *Clipper Carloading Company v. Trans-Pacific Freight Conference of Japan, et al.*, Docket No. 72-20, Order of Dismissal, July 21, 1975. However, even when the Commission has specifically refused to vacate an order of a presiding judge dismissing a complaint with prejudice, it has subsequently entertained petitions to vacate and impliedly indicated that under proper circumstances such as "overriding public interest considerations" it could permit a reopening of the proceeding. See the Order in the *Ace Machinery* case, cited above, p. 1535.

[4] Seatrain also bases its request upon the fact that it is a defendant in an unidentified antitrust case brought by Conex and suggests that it somehow might need a determination on the merits by this Commission in connection with that litigation. I am not given much explanation as to why this might be so. If Seatrain means to say that Shipping Act findings as to the long-terminated practices are necessary to its defense in the antitrust case, doubtless it can convince the Court of the need for referral to the Commission under the doctrine of primary jurisdiction. Cf. *Carnation Company v. Pacific Westbound Conference et al.*, cited above, 383 U.S. at pp. 222, 223.

[5] Although my ruling permitted respondents to file their comments simultaneously with those of Conex and did not provide for replies to Conex unless such would be appropriate (ruling, p. 6), Seatrain's immediate reply is understandable considering the suggestions contained in Conex's request for withdrawal. I have therefore accepted and considered Seatrain's second letter. However, since both sides have expressed their positions, further comments are unnecessary.

depart. Normally this would be a legitimate concern. However, as I explained above, the Congress anticipated Seatrain's concern by legislating a two-year period of limitations and Conex's right to seek money damages (reparation) under the Shipping Act, 1916, is now time-barred and, in effect, its complaint has been dismissed with prejudice in this respect. As to the issues of possible violations of law occurring between February and September 1973, it does not seem likely that Conex, which is seeking damages in an antitrust case, would desire to resume litigation before the Commission with no prospects of recovering damages and even if it did,[6] there are five-year statutes of limitations which will expire in 1978 (18 U.S.C. 3282; 28 U.S.C. 2462) so as to protect Seatrain against statutory penalties assuming violations are found and related court action is contemplated. There is, furthermore, as Seatrain notes, no evidentiary "record" in this case, merely proffered documents and other materials which have not been admitted into evidence. (This fact provides additional reason why I should not make findings on the merits which Seatrain is requesting). In short, I believe that Seatrain's apprehensions about possible revival of this complaint case to its "extreme prejudice" are not realistic. Furthermore, if there is a possibility that the Court in the antitrust case needs findings under the Shipping Act in connection with the antitrust case, as Seatrain earlier hinted, these findings should be made by means of the full hearing process rather than by summary edict via an order of dismissal with prejudice.

(S) NORMAN D. KLINE,
Administrative Law Judge.

[6] Seatrain suggests the possibility that the Court in the pending antitrust case may refer certain matters to the Commission for determination. I do not know how possible such action by the Court may be but if it should occur, obviously it would not happen at a far distant time in the future and would doubtless occur because Seatrain itself or another defendant persuaded the Court to take such action.

FEDERAL MARITIME COMMISSION

No. 73-27

CONSOLIDATED EXPRESS, INC.

v.

SEA-LAND SERVICE, INC., ET AL.

NOTICE OF DETERMINATION NOT TO REVIEW

April 4, 1977

Notice is hereby given that the Commission on April 4, 1977, determined not to review the order of dismissal in this proceeding served March 8, 1977.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 505

KUHNE & NAGEL

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

April 4, 1977

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on April 4, 1977.

It is Ordered, That applicant is authorized to waive collection of $3,626.56 of the charges previously assessed Kuhne & Nagel.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 505 that effective July 15, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from July 15, 1976 through August 19, 1976, the rate from Group 1 Ports on 'Boots, ski, N.O.S.', minimum 12 tons per container, is $142.00 W subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 505

KUHNE & NAGEL

v.

SEA-LAND SERVICE, INC.

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298) and section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Sea-Land Service, Inc. (Sea-Land or Applicant) has applied for permission to waive collection of a portion of the freight charges on seven shipments of ski boots that moved from Genoa, Italy to (respectively Oakland (3), Los Angeles, and Long Beach, California, and Seattle, Washington (2), under bills of lading dated July 24, 1976 (four shipments), July 30, 1976 (two shipments), and August 5, 1976 (one).

The subject shipments moved under Sea-Land westbound Mediterranean-Pacific Coast joint container freight tariff No. 205, FMC–77, ICC–73, 15th revised page 138, effective June 25, 1976, under the rate for the item "Boots, Ski, N.O.S.: from Italy only" (Item 19–070). The aggregate weights of the seven shipments were, respectively, 10,120 kilos, 9947, 9844, 10,086, 9820 and 9408 kilos. The rate applicable at time of shipment was $224 per ton of 1000 kilos, minimum 7 tons per container. The rate sought to be applied is $142 per ton of 1000 kilos, minimum 12 tons per container. Sea-Land westbound Mediterranean-Pacific Coast joint container freight tariff No. 205, FMC–77, ICC–73, 16th revised page 138, item 19–070, effective August 19, 1976.

The shipments moved via Sea-Land's mini-landbridge service, by water from Genoa, Italy to Elizabeth, New Jersey, then by rail to their west coast destinations. Although moved under a through rail-water rate, the

[1] This decision became the decision of the Commission April 4, 1977.
[2] 46 U.S.C. 817, as amended.

waiver of a portion of the charges involved here would affect only the ocean carrier's portion.

Aggregate freight charges pursuant to the rate applicable at time of shipment amounted to $15,554.56 (combined total for seven shipments). Aggregat freight charges at the rate sought to be applied amount to $11,928. The difference sought to be waived is $3,626.56. The Applicant is not aware of any other shipments of the same commodity which moved via Sea-Land during the same period of time at the rates involved in this shipment.

Sea-Land offers the following as grounds for granting the application:

(4) In early July Sea-Land agreed to publish a reduced through ocean-rail rate of $142.00W for a movement of ski boots to be made from Genoa to Pacific Coast destination terminals. Rate was to be published to be applicable in Sea-Land's mini-landbridge service in time for shipments that were to begin to move in the last half of the month. Publication of the agreed rate was made in Item No. 19-070 on 16th revised page of Tariff No. 205 with an issue date of July 13th, applicable only from ports in Italy. Through clerical error on Sea-Land's part the rate was erroneously symbolized as an increase effective on full statutory notice of 30 days (Attachment No. 1), whereas it should have carried a teardrop of (R) reduction symbol. With an issue date of July 13 the reduced rate should have been made effective on July 15 on not less than one day's notice, which would have been in amply time for the first shipment, dated July 24. The tariff page was not rejected by either Commission and actually became effective August 19. The mistake in tariff compilation and publication was not discovered until early August after some shipments had moved and charged at the rate of $224.00W, minimum 7 tons per container than in effect on 15th revised page 168 (Attachments No. 2 and 3).

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90-298), and Rule 6(b), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent failure to post the teardrop (R) reduction

[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

symbol next to the new rate, which was in fact a reduction and intended to be so, and which had been promised to the shipper.

2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate on which such waiver would be based.

4. The application was filed within 180 days from the date of the subject shipments.

Accordingly, permission is granted to Sea-Land Service, Inc. to waive collection of a portion of the freight charges, specifically, the amount of $3,626.56. An appropriate notice will be published in Sea-Land's tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
March 15, 1977.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 481

THE PERMANENT MISSION OF SOCIALIST REPUBLIC OF ROMANIA

v.

PRUDENTIAL LINES

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

April 4, 1977

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on April 4, 1977.

It is Ordered, That applicant is authorized to waive collection of $712.00 of the charges previously assessed The Permanent Mission of Socialist Republic of Romania.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 481 that effective December 17, 1975, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from December 17, 1975 through March 4, 1976, the special rate on 'Automobiles' is $175.00 lump sum, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff.

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 481

THE PERMANENT MISSION OF SOCIALIST REPUBLIC OF ROMANIA

v.

PRUDENTIAL LINES

April 4, 1977

Application granted.

INITIAL DECISION[1] OF THOMAS E. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298) and section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Prudential Lines (Prudential or Applicant) has applied for permission to waive collection of a portion of the freight charges on the shipment of an automobile from Costanza, Romania to New York, under Prudential bill of lading dated December 17, 1975. The application was filed May 17, 1976.

The subject shipment moved under Prudential Lines Inc. Mediterranean/U. S. Atlantic Freight Tariff FMC No. 43, Section 1, page 16, 6th revised, effective December 11, 1975, under the rate for "Cargo, N.O.S." The shipment measured 14′ × 4′ 10″ × 4′ 4″. The rate applicable at time of shipment was $107 W/M. The rate sought to be applied is a special lump sum rate of $175 for automobiles for the Permanent Mission of the Socialist Republic of Romania, which had been agreed upon in advance by the shipper and the carrier, but which rate was inadvertently forgotten to be filed until after the shipment was completed. See Prudential Lines Inc. Mediterranean/U.S. Atlantic Freight Tariff FMC No. 43, Section 1, page 16, 15th revised, effective March 4, 1976 (correction #184).

Aggregate freight charges payable, pursuant to the rate applicable at the time of shipment, amounted to $887. Aggregate freight charges at the rate sought to be applied amount to $175. The difference sought to be

[1] This decision became the decision of the Commission April 4, 1977.
[2] 46 U.S.C. 817, as amended.

waived is $712. The Applicant is not aware of any other shipment of the same commodity which moved via Prudential during the same time period at the rates involved in this shipment.

The documents submitted with Prudential's application, together with others submitted later in response to requests from the assigned Administrative Law Judge, establish that an agreement was reached between Prudential's representative in Romania and the Ministry of Foreign Affairs of the Socialist Republic of Romania, whereby an automobile measuring 14′ × 14′ 10″ × 4′ 4″ would be shipped from Costanza, Romania, to the Permanent Mission of the Socialist Republic of Romania in New York, U.S.A. for a lump sum special rate of $175. However, due to poor communications and a lack of understanding of F.M.C. regulations by Prudential's Romanian agent, the lump sum rate was not transmitted to New York until after the shipment had been completed.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 6(b), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent failure to timely file a new tariff, which had been agreed upon in advance by the parties.

2. Such waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Prudential filed a new tariff which set forth the rate on which such waiver should be based.

4. The application was filed within 180 days from the date of shipment.

Accordingly, permission is granted to Prudential Lines, Inc., to waive

[3] For other provisions and requirements see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

collection of a portion of the freight charges, specifically the amount of $712. An appropriate notice will be published in Prudential's tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
MARCH 11, 1977.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-54

CONSOLIDATION ALLOWANCE RULES PUBLISHED IN THE FREIGHT TARIFFS OF CONFERENCES; INDEPENDENT CARRIERS AND THE RATE AGREEMENT OPERATING BETWEEN UNITED STATES ATLANTIC PORTS IN THE UNITED KINGDOM, IRELAND, THE SCANDINAVIAN PENINSULA AND CONTINENTAL EUROPE

ORDER DENYING APPEAL AND DISCONTINUING PROCEEDING

April 15, 1977

The Commission instituted this proceeding to determine the legality under sections 16, 17 and 18(b) of the Shipping Act, 1916, of "consolidation allowance" provisions contained in the tariffs of certain conferences, rate agreement member lines, and independent lines.[1] These consolidation allowances are fees paid by the Carriers to entities called Consolidators for the services rendered by the Consolidators in amalgamating less-than-container and less-than-trailer loads of cargo into containerloads for ocean transport.

In December 1975 this Commission was informed by the carriers that the consolidation allowance provisions which had been in effect for some seven years previously were proposed to be "suspended indefinitely" effective January 12, 1976. The result of this proposed suspension was immediate vociferous protest on the part of interests representing Consolidators and others alleged to be adversely affected by the loss of consolidation allowances.[2]

As a result of these protests, and Commission concern, the proposed suspension date of January 12, 1976 was repeatedly postponed—ultimately to September 20, 1976. During this interim, the carriers proposed amended consolidation allowance provisions which were scheduled to become effective on September 20, 1976 in the place of the pre-existing provisions. The amended consolidation provisions were a great deal more

[1] When referred to generally, all carrier interests, including conferences, the rate agreement, or individual carriers, will be called "Carriers."

[2] Although these parties include freight forwarders, NVOCC's and consolidators all such interests will be referred to as "Consolidators" hereafter. They are: Andrews International, Inc.; Boston Consolidation Service, Inc.; J. E. Bernard & Co., Inc.; C. S. Greene & Co., Inc.; and Yellow Forwarding Company.

complex than their predecessors. What had been (with certain minor exceptions) a fixed allowance of $525 per container unit consolidated became a quagmire of confusing, detailed rules.[3] The net result of these amended rules, however, was the loss of allowance payments by the major portion of Consolidators and reduced payments to those few who continued to qualify for such payments.

Although these proposed amended consolidation allowance rules did, in fact, go into effect, their duration was the limited period from September 20, 1976 to November 8, 1976. On November 8, 1976, by further tariff provision amendments, the pre-September 20, 1976 *status quo* was restored. This was accomplished as a result of an Order of the Federal District Court for the Southern District of New York[4] issued on November 4, 1976, granting a Motion for Preliminary Injunction. That court ordered the restoration of the *status quo ante* by requiring the cancellation of the amended consolidation allowance rules and reinstitution of the original provisions.

Presiding Administrative Law Judge Thomas W. Reilly scheduled a pre-hearing conference for November 5, 1976. At that time, he was informed of the sequence of events described above. At that time, also counsel for the conferences informed the Presiding Officer that, effective November 8, 1976, the court's order would be implemented, and that the conferences intended to file a motion to dismiss this proceeding as moot. All other parties—save Hearing Counsel—made it clear that they would actively support such a motion in the interest of avoiding the expenditure by all concerned of unnecessary time, expense, and effort in pursuing a proceeding notwithstanding satisfaction of all affected interests.

Thereafter, as promised, counsel for the Carriers, on November 15, 1976 filed the anticipated "Motion to Discontinue Proceeding." By that filing the carriers urged discontinuance of the proceeding on the ground of mootness, and, alternatively, requested that the proceeding be held in abeyance pending resolution of certain issues in a companion proceeding.[5] In response thereto, the Consolidators, Baltic Shipping Company (BSC), Polish Ocean Line (POL), and Hearing Counsel submitted Replies. The Consolidators, BSC and POL,[6] uniformly supported the motion of the Carriers. Hearing Counsel, however, opposed the Motion to Discontinue. It was Hearing Counsel's position that four of the eight original issues placed under investigation could be dismissed but that the remaining four issues should be pursued. The Consolidators and Carriers then filed Answers taking issue with the position of Hearing Counsel.

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[3] A description of these rules may be found on pages 3–5 of the Commission's Order of Investigation and Hearing of September 24, 1976.

[4] *C. S. Greene & Co., Inc. v. North Atlantic Baltic Freight Conference*, No. 76 Civ. 4118 (S.D.N.Y., November 4, 1976).

[5] The companion proceeding is Commission Docket No. 76-35. That proceeding, which was instituted by Order to Show Cause, addressed only the issue of carrier authority under section 15 to institute, amend or discontinue consolidation allowance rules.

[6] Additionally, POL sought its dismissal as never having been involved in any proposed suspension of allowances, or amendments thereto.

On December 27, 1976, the Presiding Officer issued his "Order Granting Motion to Discontinue." Thereafter, pursuant to Commission procedures, Hearing Counsel filed an Appeal from that Order, and the Carriers and Consolidators filed Replies to the Appeal.

In his Order granting the motion to discontinue this proceeding, the Presiding Officer grounded his discontinuance on the Commission's own Order of Investigation and Hearing with respect to all issues raised. In so doing, he made the following points:

> Conference Respondents point out that the Commission's September 24 Order was directed to "the consolidation rules presently in effect in the trade" (referring to the September 20 amendments to the consolidation allowance rules). Indeed, the Commission's factual and historical preamble, leading up to its Order specifying the eight issues to be heard, is filled with repeated references to the September 20 amendments to the consolidation allowance rules, the "amended" rules, the "revised" rules (see p. 2–4 of Commission's Order), and the apparent evils, inequities and mischief the September 20 amendments would create. On page 5 of the Commission's Order, the statement is made: "Further, the subject rules bring into focus several relationships which are of interest to the Commission." On page 6 the Commission concludes: Upon consideration of the above matters, the Commission is of the opinion that the consolidation rules *presently in effect* in the trade and the industry practices which have arisen *in conjunction with such rules* should be made the subject of a public investigation and hearing to determine, among other things, whether *these rules* make or give any undue or unreasonable advantage. . . . (Emphasis original.)
>
> Taking the Commission's September 24 Order as a whole, and attempting to avoid giving undue importance to any small portion taken out of context, I find that the only reasonable interpretation yields the conclusion that the Commission was primarily, if not totally, concerned with the effects, ramifications and inequities posed by the September 20 amendments to the Conference Respondents' consolidation allowance rules, and *not* to a broad study of consolidation rules in general.[7] (Emphasis original.)

Hearing Counsel's position on appeal is, essentially, that: (1) The Presiding Officer correctly ruled as to issues (1), (4), (5) and (6) of the original Order of Investigation because these issues dealt with allegations of violations of sections 16 First, 18(b)(3), 18(b)(5) and 17 of the Shipping Act by virtue of implementation of the amended consolidation allowance rules; and (2) The Presiding Officer erred, however, in permitting the discontinuance of the proceeding with respect to issues (2), (3), (7) and (8) of the Order of Investigation because these issues allegedly address possible statutory violations resulting from implementation of consolidation allowance rules *generally*, and are issues which ". . . involved regulatory considerations which transcend any of the changes to the tariff provisions. . . ."

The Consolidators and the Carriers oppose Hearing Counsel's appeal, essentially on the grounds relied upon by the Presiding Officer in his discontinuance order.

We concur in the findings and conclusions of the Presiding Officer. The further prosecution of the issues involved *under the terms of the original Order* does not appear to be warranted. We take no position at this time

[7] *Order Granting Motion to Discontinue*, December 27, 1976, pp. 5–6.

as to the merits of the issues alleged by Hearing Counsel to have survived the cancellation of the amended consolidation rules. The Commission shall keep such issues under advisement. However, should we determine to pursue these issues, such an investigation will be instituted afresh and not be attempted to be molded out of whatever imprecise issues in the original Order may arguably survive in this proceeding.

THEREFORE, IT IS ORDERED, That the Appeal of Hearing Counsel from the Order Granting Motion to Discontinue is denied; and

IT IS FURTHER ORDERED, That this proceeding be, and hereby is, discontinued.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NOS. 71–2, 71–8, 71–26, AND 71–34

TRANSAMERICAN TRAILER TRANSPORT, INC.
SEATRAIN LINES, INC.
DANIELS & KENNEDY, INC.
CHANDRIS AMERICA LINES, INC.
GREEK LINE, INC.
HOME LINE AGENCY, INC.
INCRES LINE

v.

THE NEW YORK SHIPPING ASSOCIATION, INC.

DISMISSAL OF COMPLAINTS

April 13, 1977

The captioned complaints were consolidated with our investigation in Docket No. 69–57, *Agreement No. T–2336—New York Shipping Association Cooperative Working Arrangement,* which was designed to establish the formula to be used by the New York Shipping Association, Inc. (NYSA) in assessing carriers and other employers of maritime labor to raise monies to fund various fringe benefits for longshoremen for the 1969–1971 period and to insure that the necessary adjustments in assessments are made to implement the assessment formula approved by the Commission. The Commission has approved an assessment formula (*Agreement No. T–2336—New York Shipping Assoc.*, 15 F.M.C. 259 (1972)), and such approval has been affirmed upon court review. (*Transamerican Trailer Transport, Inc. v. F.M.C.*, 160 U.S. App. D.C. 351, 492 F.2d 617 (1974)). The Commission has also ordered that various assessment adjustments be made which it determined were necessitated by its action in 15 F.M.C. These adjustments are now the subject of review proceedings in the Court of Appeals for the District of Columbia Circuit. No. 76–2024—*NYSA v. F.M.C. & U.S.A.*, and No. 76–2026—*States Marine International, Inc. v. F.M.C. & U.S.A.*

The captioned complaints dealt with matters that are no longer subject to dispute, and will remain so regardless of the outcome of the pending review proceedings. Docket Nos. 71–2, 71–8, and 71–34 dealt solely with

questions relating to the authority of NYSA to raise the level of assessments on "excepted" cargoes and the propriety of such increased assessments. A challenge with respect to the increased assessment on excepted cargoes also formed a part of the gravamen of the complaint in 71–26. See 15 F.M.C. *supra,* at 302. These questions were resolved against Complainants in these proceedings in the Commission's action with respect to the establishment of the proper assessment formula. See 15 F.M.C. *supra,* at 264, 301–303; 160 U.S. App. D.C., *supra,* at 355, 360, 492 F.2d, *supra,* at 621, 626.

Moreover, Transamerican Trailer Transport, Inc., Seatrain Lines, Inc., and Daniels and Kennedy, Inc., the Complainants in 71–2, 71–8, and 74–26, respectively, have entered into Commission-approved settlement agreements which resolve all issues as between these Complainants and NYSA with respect to the 1969–1971 assessment period. (See Report in Docket No. 69–57, served September 17, 1976, pages 4–5, 12.)

THEREFORE, IT IS ORDERED, That, the subject complaint proceedings be, and they hereby are, dismissed.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 485

FORD MOTOR COMPANY

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

April 13, 1977

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on April 13, 1977.

It is Ordered, That applicant is authorized to waive collection of $30,170.88 of the charges previously assessed Ford Motor Company.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 485 that effective December 31, 1975, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from Decmeber 31, 1975 through February 23, 1976, the rate to Hiroshima, Japan on 'Shipping Containers, metal, Instruments of International Trade, Empty, K/D' is $135.00W, subject to a minimum of 11.68 weight tons per container, and the rate is subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 485

FORD MOTOR COMPANY

v.

SEA-LAND SERVICE, INC.

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended b P.L. 90–298) and section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Sea-Land Service, Inc. (Sea-Land or Applicant) has applied for permission to waive collection of a portion of the freight charges on a shipment of empty metal shipping containers that moved from Houston, Texas to Hiroshima, Japan, under a Sea-Land bill of lading January 16, 1976. The application was filed July 14, 1976.

The subject shipment moved via mini-landbridge service by rail from Houston to Oakland, California, then over water to Hiroshima, via Kobe, Japan. The shipment moved under a through rail-water rate published in Sea-Land Freight Tariff No. 234, FMC–106 and ICC–92, item #692–9999–32, 1st revised page 477, effective December 31, 1975. Refund of the charges here involved would affect only the ocean carrier's portion. The aggregate weight of the shipment was 187,008 pounds, and it measured 14,160 cubic feet. The rate applicable at time of shipment was $135 per ton of 40 cubic feet or 2000 pounds, with a minimum of 11.68 revenue tons per container. The rate sought to be applied is $135 per weight ton of 2000 pounds, with a minimum of 23,360 pounds per container (11.68 weight tons), per Sea-Land Freight Tariff No. 234, FMC–106, ICC–92, item #692–9999–32, 2nd revised page 477, effective February 23, 1976.

Aggregate freight charges payable, at the rate applicable at time of shipment, amounted to $49,560. Aggregate freight charges at the rate sought to be applied amount to $19,389.12 (including container service charge). The difference sought to be waived is $30,170.88. The Applicant

[1] This decision became the decision of the Commission April 13, 1977.
[2] 46 U.S.C. 817, as amended.

is not aware of any other shipment of the same commodity which moved via Sea-Land during the same time period at the rates involved in this shipment.

Sea-Land offers the following as grounds for granting the application:

(4)Sea-Land negotiated with Ford Motor Company for a rate to cover movement of knocked-down shipping racks being returned from Houston, Texas, or New Orleans, La. to Hiroshima, Japan. A rate of $135.00 per weight ton of 2,000 lbs., to apply in Sea-Land's mini-landbridge service was agreed upon as a special rate to apply only to Hiroshima. Letter from Ford Motor Company dated October 29, 1975 to Sea-Land (attachment no. 1) confirms these negotiations. The agreed rate was to become effective by January 1, 1976 and remain in effect through March 31, 1976 to cover the anticipated period of movements. It also included attachment of a minimum weight of 11.68 weight tons per container to the rate, to insure adequate minimum revenue for Sea-Land, as set forth in teletype exchanges dated September 30 and October 29 (attachment no. 2) between Sea-Land's Oakland (Pacific Division) office and the home office in Edison (Menlo Park).

In sending the publication instructions, however, our Pacific Division in Oakland erroneously transmitted to the Pacific Division in Elizabeth a weight or measurement option for the rate, whereas the agreement was for the rate to apply on a weight basis only, subject to the minimum weight per container. This clerical error was carried forward to the actual tariff publication request (attachment no. 3) resulting in publication of the agreed rate on an optional weight of measurement basis in Item No. 629 9999 31 on 1st revised pate 477 effective December 31, 1975 together with the applicable conditions and notes on 2nd revised page 82, 4th revised page 83 and 3rd revised page 86 (attachment no. 4).

Within a few days after the effective date of December 31, the error in publication was picked up. By teletype dated January 7, 1976, the Pacific Division in Oakland instructed a correction be made, and it was passed to the tariff publications department January 12 (attachment no. 5). Actual publication of the correct rate was made on 2nd revised page 477 (attachment no. 6) which became effective February 23, 1976 on statutory 30 days' notice. Less than statutory notice was not authorized for this type of publication under the Interstate Commerce Commission's guidelines then governing reductions in rates in mini-landbridge tariffs. . . .

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90-298),and Rule 6(b), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of

[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in Sea-Land's inadvertent failure to transmit the proper application of the negotiated, already agreed rate to their tariff publications department and, in turn, to the official tariff file in the Federal Maritime Commission.

2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate on which such waiver would be based.

4. The application was filed within 180 days from the date of the subject shipment.

Accordingly, permission is granted to Sea-Land Service, Inc. to waive collection of a portion of the freight charges, specifically the amount of $30,170.88. An appropriate notice will be published in Sea-Land's tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
March 23, 1977.

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

Subchapter B—Regulations Affecting Maritime Carriers and Related Activities

Part 514—Reports of Rate Base and Income Account by Significant Vessel Operating Common Carriers in the Domestic Offshore Trades

[GENERAL ORDER 36, DOCKET NO. 67-57]

April 20, 1977

Repeal of Part 514

AGENCY: Federal Maritime Commission
ACTION: Repeal of Part 514
SUMMARY: Rules requiring the maintenance of records and submission of data with respect to rate bases are revoked and repealed.

Effective Date: Upon publication in the *Federal Register.*

For further information contact:

Joseph C. Polking, Acting Secretary
Federal Maritime Commission
1100 L Street, N.W.
Washington, D.C. 20573
(202) 523-5725

Supplementary Information: The Commission issued its Report and final rules in this proceeding on August 18, 1976 to become effective on December 6, 1976. Prior to the effective date, several persons filed petitions requesting reconsideration of these rules and/or reopening of the proceeding.[1] As a result of these filings, the Commission postponed the effective date of the rules pending its review of the various petitions.

[1] Petitions were filed by the following carriers:
(1) Matson Navigation Company (Matson);
(2) Sea-Land Service, Inc. (Sea-Land);
(3) Puerto Rico Maritime Shipping Authority (PRMSA);
(4) Farrell Lines, Inc. (Farrell); and

Of those filing petitions, only Matson, Sea-Land and PST&B have participated in this proceeding previously. All the other nine carriers were either not in the domestic offshore trade or not in existence at the time of the proceedings in this docket. For example, Farrell urges reconsideration of the final rules on the grounds that it did not enter the trade until January 1976 and, as a result, has not had an opportunity to express its views in this proceeding. Likewise, PRMSA argues that it has not had any opportunity to participate in the formulation of the final rules promulgated by the Commission because (1) the proceeding was initiated seven years before PRMSA was created; and (2) the bulk of the testimony was taken five years before PRMSA was created. PRMSA submits that sound regulatory principles and the public interest require that the proceeding be reopened to permit PRMSA to be heard before implementation of these rules.

The petitions now before the Commission also raise issues of economic and accounting theory and practice. Additionally, they reargue the burdensomeness of compliance with the rules.

After careful consideration of the petitions now before us and giving due regard to the fact that the carriers not previously participating in this proceeding represent a substantial portion of the entire capability in the very trades, *i.e.*, domestic offshore, the Commission's final rules were intended to address, we have decided to withdraw the rules promulgated on August 18, 1976 in this proceeding and discontinue the proceeding.

THEREFORE, IT IS ORDERED, That this proceeding be, and hereby is, discontinued.

AND, IT IS FURTHER ORDERED, That the rules promulgated on August 18, 1976 and published in the *Federal Register* on September 8, 1976 (41 F.R. 37785) be, and hereby are, revoked.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

(5) Crowley Maritime Corporation, on its own behalf and as parent corporation for:
(a) Trailer Marine Transport Corp.;
(b) Interisland Intermodal Lines, Inc.;
(c) Gulf Caribbean Marine Lines;
(d) CTMT, Inc.;
(e) Hawaiian Marine Lines, Inc.;
(f) Arctic Lighterage Co.; and
(g) Puget Sound Tug and Barge Company (PST&B).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 496

AMERICAN GILSONITE CO., INC.

v.

LYKES BROS. STEAMSHIP CO., INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

April 13, 1977

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on April 13, 1977.

It is Ordered, That applicant is authorized to waive collection of $5,951.93 of the charges previously assessed American Gilsonite Co., Inc.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 496 that effective April 10, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from April 10, 1976 through July 1, 1976, the rate on 'Gilsonite, packed', in house to house containers, minimum 17.8 LT per container is $46.00W subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 496

AMERICAN GILSONITE CO., INC.

v.

LYKES BROS. STEAMSHIP CO., INC.

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298) and section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Lykes Bros. Steamship Co., Inc. (Lykes or Applicant) has applied for permission to waive collection of a portion of the freight charges on a shipment of gilsonite, which moved from Galveston, Texas to Rotterdam, Netherlands, under a Lykes bill of lading dated May 26, 1976. The application was filed November 12, 1976.

The subject shipment moved under Gulf European Freight Association Agreement (GEFA) 9360–3 Tariff No. 2, FMC–2, 4th revised page 73, effective March 10, 1976, under the rate for the item "Gilsonite, packed." The aggregate weight of the shipment was 240,222 pounds (in six containers). The rate applicable at time of shipment was $96 per ton of 2,240 pounds (weight only). The rate sought to be applied is $40.50 per ton of 2,240 pounds (weight only) when packed in house-to-house containers, with a minimum of 17.8 long tons per container. This latter rate had been agreed upon in advance by the shipper and the carrier, and had been filed in the GEFA tariff cited above on 3rd revised page 73; however, through inadvertent administrative and clerical error, the 4th revised page 73 was published bearing an unintended April 9, 1976 expiration date, thus leaving only the higher $96 rate effective as of the time of shipment on May 26, 1976. This was not corrected until the issuance of the 10th revised page 73 (same tariff citation as above), effective November 11, 1976. It should be noted that the application refers several times to the "7th revised" as being the correction; however,

[1] This decision became the decision of the Commission April 13, 1977.
[2] 46 U.S.C. 817, as amended.

it is clear from the reference to the effective date (November 11, 1976), the tariff pages submitted with the application, and a review of the official tariff documents on file at the Commission, that the reference to "7th" was a typographical error—that the 10th revised page 73 is the relevant error correction.

Aggregate freight charges payable pursuant to the rate applicable at time of shipment amounted to $10,295.23. Aggregate freight charges at the rate sought to be applied amount to $4,343.30. The difference sought to be waived is $5,951.93. The Applicant is not aware of any other shipments of the same commodity which moved via Lykes during the same time period at the rates involved in this shipment.

Lykes offers the following as grounds for granting the application:

> Prior to February 20, 1976, respondent had negotiated with American Gilsonite Co., a rate of $40.50/2240 lbs. covering the movement of Gilsonite, packed in House to House containers, minimum 17.8 long tons per container. This rate was then filed in the Gulf European Freight Association Tariff Number 2 (FMC–2) per page 73, 3rd revised (copy attached).
>
> During March 1976 Lykes reviewed this same tariff to delete rates against which cargo was not currently moving. Thru administrative error, the $40.50/2240 lbs. rate was inadvertently deleted effective April 10, 1976, as per GEFA page 73, 4th revised (copy attached), overlooking the fact that American Gilsonite was tendering the cargo for shipment against that rate.
>
> On March 30, 1976, Lykes issued booking contract #019–2057 (copy attached) with the expressed understanding the $40.50/2240lbs. rate was to be applied. Despite the fact that copies of this contract were furnished to Lykes Galveston, Houston and New Orleans offices, the administrative personnel failed to note the necessary rate extension required and thus the rate expired April 10.
>
> The vessel (Almeria Lykes voyage 36) sailed Galveston May 26th and the cargo moving under the referenced contract was assessed the only then current tariff rate of $96.00/2240 lbs. as per GEFA tariff pg 73, 4th revised (copy attached). . . .

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 6(b),*Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of

[3] For other provisions and requirements see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, due to inadvertently deleting the negotiated rate from the filed tariff.

2. Such waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Lykes filed a new tariff which sets forth the rate on which such waiver would be based.

4. The application was filed within 180 days from the date of shipment.

Accordingly, permission is granted Lykes Bros. Steamship Co., Inc., to waive collection of a portion of the freight charges, specifically the amount of $5,951.93. An appropriate notice will be published in Lykes' tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
March 17, 1977.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-51

WEST COAST OF ITALY, SICILIAN AND ADRIATIC PORTS/NORTH ATLANTIC RANGE CONFERENCE AMENDED TARIFF RULE ESTABLISHING AN ALLOWANCE ON PREPAID FREIGHT

Allowance of a 3 percent discount for prepaid shipments found not violative of sections 16 and 17, Shipping Act, 1916.

Stanley O. Sher and *John R. Attansio* for Respondent West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference.

John Robert Ewers and *Deana Rose*, as Hearing Counsel.

REPORT AND ORDER

April 22, 1977

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett, Bob Casey and James V. Day, *Commissioners*)

The Commission instituted this proceeding by Order served September 20, 1976, directing the West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference (WINAC) and its member lines to show cause why the Commission should not find that its Tariff Rule 15, which provides for a 3 percent allowance (discount) on prepaid freight, is violative of sections 16, First and 17 of the Shipping Act, 1916 and, accordingly, why such tariff rule should not be ordered stricken from the Conference tariff. Respondent filed memoranda of law and an affidavit of fact. Hearing Counsel, who opposed the 3 percent allowance filed a memorandum of law.[1]

POSITIONS OF THE PARTIES

In its memoranda of law and upon the affidavit of G. Ravera, the Conference Secretary, WINAC argues that the discount is necessitated by a 30-day time difference in collecting the freight due between prepaid and collect shipments. In this regard, it is pointed out that when freight is

[1] Because we believe that oral argument would serve no useful purpose in this proceeding, the parties' request for oral argument is denied.

prepaid, the carrier receives payment prior to the sailing of the vessel—generally when the cargo is tendered, but that on collect shipments the carrier receives payment only upon tender for delivery at the destination port. WINAC asserts that berthing time after tender and before sailing, sailing time, which may include intermediate ports of call, free time, and the time between tender for delivery and payment to the carrier or its agent, results in a 30-day difference between the receipt of payment for prepaid and collect shipments.

WINAC maintains that the foregoing delay in receipt of payment translates into an appreciable difference in the cost to the carrier, a major part of which is "attributable to the necessary increase in working capital caused by the delay." Respondent argues that the Commission has recognized that working capital is an appropriate part of the rate base[2] and has defined working capital for rate purposes as:

> The cash necessary to pay operating expenses incurred for common carrier service prior to the time when the revenues from that service are collected and available. *Alaskan Rates, supra* at 556.

WINAC contends that since the need for working capital is necessitated by the time lag between the payment of expenses and the receipt of payment in respect to which the expenses were incurred, "there is no question that a carrier's need for working capital increases as the incidence of collect shipments increases." WINAC views the present economic conditions in Italy as exacerbating the cost of these increased working capital requirements. In support of this contention Respondent cites the annual inflation rate in Italy of 18 percent, short-term interest rates of 23 percent, and the decline of the lira and exchange restrictions as factors which affect the cost of increased working capital requirements.

WINAC further argues that because the Commission has recognized a "comparative approach to assessing the reasonableness of rates, including comparisons with foreign to foreign rates,"[3] the 3 percent discount for prepaid shipments finds further support in a comparison with the rate structure of other Italian trades. G. Ravera notes in his affidavit that "in the trades between Italy on the one hand and West and South Africa, Australia, and the Far East, on the other, a surcharge ranging between 2.5 and 5 percent is imposed on freight collect."

Because of the fluctuations in the Italian economy and the cost involved in the mechanics of collect shipments, WINAC submits that its rate differential is not unreasonable, discriminatory, nor results in undue preference. The rate differential provided for in Tariff Rule 15 is an allegedly reasonable differential for different transportation services.

WINAC states that while the Commission's predecessor, the United States Shipping Board, in *American Tobacco Co. v. Campagnie Generale*

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[2] *General Increase in Rates Pacific—Atlantic/Guam Trade*, 8 F.M.C. 498, 501 (1965), *remanded on other grounds, Guam v. Federal Maritime Commission*, 124 U.S. App. D.C. 324, 365 F.2d 515 (1966), *cert. denied, Pacific Far East Lines v. Guam*, 385 U.S. 1002, *Alaskan Rates*, 2 U.S.M.C. 558, 566 (1941), *modified*, 2 U.S.M.C. 639 (1942).

[3] *E.g., Investigation of Ocean Rate Structures*, 12 F.M.C. 34 (1968).

Transatlantique, 1 U.S.S.B. 53 (1923) found the rate differential in that proceeding to be prejudicial and discriminatory, it was only that carrier's inability to justify the magnitude of the rate differential which resulted in such a finding.[4] WINAC submits that not only does the different service and cost justify the rate differential, but also that failure to provide such a differential imposes an unfair burden on shippers who do not ship freight collect. Because collect shipments increase the carrier's cost, Tariff Rule 15 allegedly relieves prepaying shippers of a cost burden which they have not created and at the same time establishes a modest incentive for other shippers to prepay their freight and thereby aid in holding down pressures for general rate increases. Thus, WINAC is of the opinion that the Tariff Rule 15 clearly benefits shippers and is neither violative of sections 16, First nor 17 of the Shipping Act, 1916.[5]

Lastly, WINAC submits that even assuming, *arguendo*, that it could be concluded that the differential permits the collection of different rates for similarly situated shippers, no violation of section 16 can be shown, since the presence of a competitive relationship is required to prove a case of undue preference or prejudice under section 16. WINAC notes that the discount is available to all shippers and consignees, and that there is no known competitive relationship between shippers who ship collect as opposed to prepaid. In addition, WINAC cites the lack of shipper complaints since the inception of the rate as probative of the lack of prejudice or preference resulting from the application of a three percent differential.

Hearing Counsel takes issue with every argument of law and factual allegation made by Respondent. At the outset Hearing Counsel submit that Respondent has failed to proffer sufficient facts to justify an allowance in freight charges through prepayment as previously found to be violative of the Shipping Act, in *American Tobacco, supra*.

Hearing Counsel next attack Respondent's premise that the lack of shipper complaints against Tariff Rule 15 is indicative of the rule's legality. In this connection, Hearing Counsel contends that while the Commission has not addressed this argument in a section 16 or 17 proceeding, the Commission in finding a violation of section 18(b)(5) in *Investigation of Ocean Rate Structure*, 12 F.M.C. 34 (1966) "summarily dismissed this argument by deciding that the lack of shipper grievance is immaterial."

Hearing Counsel dispute Respondent's analysis of the relationship between prepaid freight and the need for sufficient working capital. While Hearing Counsel agree that working capital is a proper item in determining

[4] In *American Tobacco, supra*, the carrier accepted payment in francs at the current rate of exchange when freight was prepaid in France but computed charges for freight collect on the basis of a *fixed* rate of 5 francs per dollar. In the time period concerned the exchange rate rose from 5.88 to 17.07½ francs per dollar. The Board found that the difference in rates—approaching 56%—exceeded the carrier's additional expenses for handling cargo freight collect and accordingly was unduly discriminatory and prejudicial.

[5] WINAC also challenges what it terms the Interstate Commerce Commission's (ICC) ancient and dogmatic approach to prepayment discounts. The ICC has generally rejected prepayment discounts based solely on the time of payment.

the rate base, they argue that the formula for calculating working capital does not vary if the freight is shipped prepaid or collect. Hearing Counsel view Tariff Rule 15 as an attempt to increase the Respondent's working capital without sufficient facts for a proper evaluation. In this regard, Hearing Counsel argue that if the Respondent carriers do not have to pay voyage expenses until 45 days after the voyage, then it is immaterial if there is a 30-day delay in the receipt of payment from a collect shipper.

Hearing Counsel maintain that Respondent has failed to prove that the 3 percent allowance results in an equivalent lessening of cost. Nor does Hearing Counsel accept Respondent's comparison of the 3 percent allowance with the surcharge for collect shipments in foreign to foreign trades. It is improper, Hearing Counsel argue, to compare the surcharge with the prepayment discount because the cases cited by Respondent in support of this position deal exclusively with comparisions of reciprocal or competitive trades and not foreign to foreign trades. Furthermore, Hearing Counsel argue that even if the trades were comparable, Respondent has not submitted any legal arguments to establish that the surcharge in the mentioned foreign to foreign trades is not unjustly discriminatory or preferential.

Hearing Counsel concludes that Respondent's factual and legal submissions are insufficient and that WINAC has failed to demonstrate that higher costs justify higher charges for collect shipments or that there is no competitive relationship between prepaid and collect shippers and hence, no violation of section 16, First. Hearing Counsel therefore urge "the Commission to strike Tariff Rule 15 or take other appropriate action as the circumstances warrant."

Discussion and Conclusions

The Commission and its predecessors have on only one occasion squarely addressed the issue of a freight differential for the prepayment of freight charges with respect to sections 16 First and 17, Shipping Act, 1916. In *American Tobacco Co. v. Compagnie General Transatlantique*, 1 U.S.S.B. 53 (1923), aff'd 31 F.2d 663; *cert. denied* 280 U.S. 555 (1929), the United States Shipping Board considered a carrier's practice of accepting payment in francs at the current rate of exchange when freight was prepaid in France, but computing charges for freight collect on a *fixed* basis of 5 francs to the dollar in New York. In that instance, the Board found that the freight differential was unduly preferential and unjustly discriminatory in violation of sections 16 and 17 because the difference in charges exceeded the total amount of the carrier's additional expenditures for transporting the cargo freight collect. The Board did not find that all freight differentials based upon prepayment were unlawful but rather found that such differentials are only unlawful to the extent they exceed the carrier's cost for transporting the cargo freight collect. Indeed, the Board expressly recognized that:

As the incidents of the transportation service in connection with the complainant's collect shipments resulted in added expense to the carrier, . . . the cost thereof might properly be reflected *in a higher charge than for prepaid shipment*, (emphasis added), 1 U.S.S.B. at 57.

The Board's rationale in the *American Tobacco* decision clearly indicates that the finding of a violation of sections 16 and 17 was not based on a theory that the rate differential was *per se* unlawful but rather on the inability of the respondent in that proceeding to justify the *level* of the differential. The determinative factor therefore is whether the conference or carrier can justify added expenses for handling collect shipments. Accordingly, the amount of the allowance for prepaid shipments, if any, must be determined on a case-by-case basis. Any allowance based upon the time of payment must withstand scrutiny under the applicable provisions of the Shipping Act, 1916, and must be justified by a showing that collect shipments result in added expense to the carrier. An examination of the record before us in this proceeding, indicates that the WINAC 3 percent allowance for prepaid shipments as provided in its tariff is warranted.

The representations of the Respondent in its brief and affidavit are unrefuted. In its memoranda of law and affidavit submitted by the Conference Secretary, Respondent states that the average difference in time between the receipt of freight prepaid and the receipt of freight collect is approximately 30 days and that this delay in the receipt of payment results in additional cost to the carrier, a major part of which is attributable to the necessary increase in working capital caused by the delay. The impact of the delay in payment is exacerbated by the condition of the Italian economy. Short term interest rates of 23 percent and the Italian inflation rate, which is approaching 18 percent, are cited as factors which increase the cost associated with collect shipment. In addition, the continued decline in the exchange rate of the lira has resulted in governmental restrictions which in turn affects the cost and risk of extending credit for collect shipments. For instance, the Italian Government had required that the purchase of dollars from within Italy be accompanied by a six-month deposit of 50 percent of the purchase price, interest free, in the Bank of Italy. More recently, the Government imposed a surcharge tax of seven percent on foreign exchange purchases. Although none of these restrictions are currently in effect,[6] the exchange restrictions imposed by the Italian Government are indicative of the instability in the Italian economy.

In view of the foregoing, we find that due to the present condition of the Italian economy, the deferral of payment by WINAC carriers on collect shipments results in added costs to those carriers which justify the imposition of a three percent allowance on prepaid shipments. However, because economic conditions are never static, the Commission intends to

[6] Source: International Monetary Fund.

closely monitor the status of the Italian economy, particularly changes in the inflation and interest rates, and periodically review the effect of Tariff Rule 15 on cargo movements in the trade to determine its continued validity.

THEREFORE, IT IS ORDERED, That this proceeding be discontinued.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 351(I)

STANISLAUS IMPORTS, INC.

v.

SEA-LAND SERVICE, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

April 22, 1977

Notice is hereby given that the Commission on April 22, 1977, determined not to review the decision of the Settlement Officer in this proceeding served April 14, 1977.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 351(I)

STANISLAUS IMPORTS, INC.

v.

SEA-LAND SERVICE, INC.

Reparation Awarded.

DECISION OF JUAN E. PINE, SETTLEMENT OFFICER[1]

Stanislaus Imports, Inc. (complainant) claims $289.75 as reparations from Sea-Land Service, Inc. (carrier) for alleged freight overcharges on two shipments of beads from Kobe, Japan to San Francisco, California, one via the SEA-LAND EXCHANGE on a bill of lading dated March 16, 1975, and the second via the SEA-LAND Trade on a bill of lading dated April 16, 1975. While the complainant does not specifically allege a violation of the Shipping Act, 1916, it is presumed to be a violation of Section 18(b)(3) thereof.

The conference chairman and the carrier, in separate letters advised complainant that the claims were not submitted before the cargo left the carrier's custody, and referred to the Trans-Pacific Freight Conference of Japan/Korea Tariff No. 35, FMC–6 which provides in Rule 59:

"Claims for adjustment of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carrier in writing before the shipment involved leaves the custody of the carrier. All other claims for adjustment of freight charges must be presented to the carrier in writing within six (6) months after the date of shipment."[2]

Basically the two movements covered shipments of Beads on which the carrier assessed the rate of $94.00 per measurement ton of 40 cubic feet based on a value exceeding $1,400 per revenue ton FOB. The bills of lading made no reference to value. Several of the carrier's letters to the

[1] Both parties having consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof. (Note: Notice of determination not to Review April 22, 1977).

[2] With respect to such a rule the Commission, in its report on remand served November 24, 1976, in *Kraft Foods v. Moore McCormack Lines, Inc.*, negated its application with respect to claims before the Commission stating in part "In effect the Rule sets up as a period of limitation, the time during which the shipment remains in the custody of the carrier, which limitation was reviewed by the Court as infringing on the rights granted by section 22 of the Shipping Act. . . ."

complainant referred to tariff Rule 11 entitled "F.O.B. Value for Rates Based on F.A.S. Valuation."[3]

The claims filed with the Commission are accompanied by commercial invoices stating the invoice value of identifiable groups of cartons, as well as certificates and lists of measurement and weight for each group of cartons. The carrier, in a letter written after the claim was filed with the Commission stated that:

"Upon investigation we find the commercial invoices included with the claims do separately state the invoice values for the separate commodities involved. The separate rates based on valuations, per Rule 11 of Tariff No. 35, FMC-6, issued by the Trans-Pacific Freight Conference of Japan/Korea, could have been applied."

Claim No. ST-1 covers the movement of 189 cartons of wooden beads and shell beads measuring 457 cubic feet and weighing 9,706 pounds which moved from Kobe, Japan to San Francisco, California on the SEA-LAND EXCHANGE on bill of lading No. 905-624568 dated March 26, 1975. No valuation was shown on the bill of lading, so the carrier assessed the conference tariff rate under Item No. 6260-15, on 3rd Revised Page 324 which covers Imitation Pearl Beads, Beaded Goods, Non-precious Beads and Personal Ornaments, Value exceeding $1,400 per revenue ton FOB of $94.00.

Claim No. ST-1 is submitted in the following format:

Total FOB value of Shipment $17,994.70.

Item 6260-10 Beads, Invoice value $9,212.56, cube 282-6 or $1,302.00 per revenue ton F.O.B.

Item 6260-15 Beads, Invoice value $8,782.14, cube 174-8 or $2,007.00 per revenue ton F.O.B.

Charged per bill of lading		$1,193.07
Should be Item 6260-10 (283 cu.) 7.075 x $80.00		$ 566.00
6260-15 (175 cu.) 4.375[4] x 94.00		411.25
Delivery $5.00 (11.45)[4]		57.25
Bunker S.C. $3.00 (11.45)[4]		34.35
C.A.F. 2.5% ($1,001.53)		25.86
		$1,094.71
Overcharge		$ 98.36

This claim, as submitted by complainant with the supporting documentation of the bill of lading, certificate and list of measurement and weight,

[3] "Where the tariff rate on any commodity is determined on the F.O.B. value, this value is to be based on the total value F.A.S. loading port on such commodity as indicated in each certified shipper's invoice, i.e., including all expenses up to delivery at ship's tackle, loading point. . . ."

[4] In its calculations complainant divided 175 cubic feet by 40 cubic feet arriving at a figure of 4.275 measurement tons. The correct figure is 4.375 measurement tons which complainant used in multiplying by the $94.00 rate to get the product of $411.25 shown above. However, in computing the delivery and bunker surcharge, complainant used the figure of 11.425 measurement tons. The sum should be 7.075 plus 4.375 or 11.45 measurement tons. Multiplying the $5.00 delivery charge and the $3.00 bunker surcharge by 11.425 measurement tons, complainant got products of $57.13 and $34.28. Using 11.45 measurement tons, the products are $57.25 and $34.35. The claim is 19 cents higher than it should be. $98.55 claimed minus 19 cents is $98.36, the amount of the claim as amended above.

and invoice of merchandise, has been computed properly, is adequately substantiated, and reparation thereon of $98.36 is awarded.

Claim No. ST–2 covers the movement of 178 cartons of wooden beads and shell beads measuring 549 cubic feet and weighing 9,424 pounds which moved from Kobe, Japan to San Francisco, California on the SEA-LAND TRADE on bill of lading No. 905–626799 dated April 16, 1975. No valuation was shown on the bill of lading so the carrier assessed the conference tariff rate under Item No. 6260–15, on 3rd Revised Page 324 which covers Imitation Pearl Beads, Beaded Goods, Non-precious Beads and Personal Ornaments, Value exceeding $1,400 per revenue ton FOB of $94.00.

Claim No. ST–2 is submitted in the following format:

Total FOB value of shipment $19,472.79

Item 6260–10 Beads, Invoice value $17,146.47, cube 532–7 or $1,286.00 per revenue ton F.O.B.

Item 6260–15 Beads, Invoice value $2,326.32, cube 16–3 or $5,185.80 per revenue ton F.O.B.

Charged per bill of lading	$1,433.24
Should be Item 6260–10 (533 cu.) 13.325 x $80.00	$1,066.00
Item 6260–15 (16 cu.) .400 x 94.00	37.60
Delivery $5.00 (13.725)	68.63
Bunker S.C. $3.00 (13.725)	41.19
C.A.F. 2.5% (1,144.79)	28.62
	$1,242.04
Overcharge	$ 191.20

This claim, as submitted by complainant with the supporting documentation of the bill of lading, certificate and list of measurement and weight, and invoice of merchandise, has been computed properly, is adequately substantiated, and reparation of $191.20 is awarded.

Total reparation of $289.56 is awarded complainant with interest at the rate of six percent per annum if not paid within 30 days of the date hereof.

(S) JUAN E. PINE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 383(I)

BRISTOL-MYERS COMPANY

v.

SEA-LAND SERVICE, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

April 22, 1977

Notice is hereby given that the Commission on April 22, 1977, determined not to review the decision of the Settlement Officer in this proceeding served April 13, 1977.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 383(I)

BRISTOL-MYERS COMPANY

v.

SEA-LAND SERVICE, INC.

Application for permission to refund a portion of the freight charges granted.

DECISION OF RONALD J. NIEFORTH, SETTLEMENT OFFICER[1]

By complaint filed February 7, 1977, Bristol-Myers Company (complainant) seeks a refund of freight overcharges in the sum of $2,588.74 collected by Sea-Land Service, Inc., (carrier) for the transportation of merchandise shipped from Port Elizabeth, New Jersey to Port of Spain, Trinidad, aboard the SS JACKSONVILLE sailing March 27, 1975, under Bill of Lading Shipper Reference #403171.

In response to this docket the carrier has stated in its reply of February 18, 1977, that the overcharge claim is correct and that payment is due Bristol-Myers. The carrier further stated that it previously declined to refund the overcharge for the reason that such action was time barred by the freight tariff.

The shipment at issue moved under the rates, terms and conditions published in the Leeward & Windward Islands & Guianas Conference Freight Tariff F.M.C. No. 1, of which the carrier is listed as participating member line. As alleged by the carrier, Rule 105 of this tariff provides in part that claims by shippers for adjustment of freight charges will be considered only when submitted in writing to the carrier within a period of six months following shipment. As noted above, the merchandise at issue was transported aboard the SS JACKSONVILLE, Voyage 194–S, over one year ago.

A review of the complainant's rate audit and the applicable tariff clearly supports the complainant's allegation that rates other than those provided for in the tariff were applied, thus resulting in an overcharge amount of $2,588.74.

[1] Both parties having consented to the informal procedure of Rule 19 of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof. (Note: Notice of determination not to review April 22, 1977).

In instances where the misapplication of a rate(s) has occurred, as in this docket, the restrictive condition contained in the above rule runs afoul of section 18(b)(3), Shipping Act, 1916, which prohibits the assessment of other than that rate(s) specified in the applicable tariff on file with the Commission and duly published and in effect at the time. Section 22 of the Act, on the other hand, provides a period of 2 years in which a person may file a complaint setting forth any violation of the Act. The remedy to this dilemma lies in the complainant seeking redress before the Commission as reflected in the instant docket.

Based upon the foregoing commentary and a review of the applicable tariff which clearly supports the validity of the overcharge as alleged by the complainant, and consistent with the carrier's concurrence in letter, of February 18, 1977, Sea-Land Service, Inc., is directed to promptly refund the complainant the sum of $2,588.74 in full settlement of the complainant's claim under this docket.

(S) RONALD J. NIEFORTH,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 386(I)

GTE INTERNATIONAL, INC.

v.

ATLANTIC LINES, LTD.

NOTICE OF DETERMINATION NOT TO REVIEW

April 22, 1977

Notice is hereby given that the Commission on April 22, 1977, determined not to review the decision of the Settlement Officer in this proceeding served April 15, 1977.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 386(I)

GTE INTERNATIONAL, INC.

v.

ATLANTIC LINES, LTD.

DISMISSAL OF COMPLAINT
and
DISCONTINUANCE OF PROCEEDING

By complaint filed February 28, 1977, GTE International, Inc., (Complainant) states that Atlantic Lines, Ltd., (Carrier) refused to honor an otherwise legitimate overcharge claim of $139.26 solely on the basis of Item 105 of the Leeward and Windward Island & Guianas Conference Freight Tariff FMC No. 1 which prohibits the payment of overcharge claims not presented to the Carrier within six months after the date of the shipment.

The complaint was served upon the Carrier on March 7, 1977; no response has been received.

By letter dated March 29, 1977, the Complainant advised the undersigned that it had received a refund check from the Carrier in the amount of $139.26 as full settlement for "Informal Docket No. 386(I)." The Complainant also requested that this docket be withdrawn.

A review of the complaint, support documentation and the involved tariff confirms the Complainant's overcharge allegation and justifies the Carrier's refund action. Accordingly, the subject complaint is dismissed and this proceeding discontinued.

(S) WALDO R. PUTNAM,
Settlement Officer.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 486

P.C. INTERNATIONAL, INC.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

April 22, 1977

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on April 22, 1977.

It is Ordered, That applicant is authorized to waive collection of $2,500.00 of the charges previously assessed P.C. International, Inc.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 486 that effective February 11, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from February 11, 1976 through February 26, 1976, the rate on 'Plywood' is $55.75 W, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 486

P.C. INTERNATIONAL, INC.

v.

SEA-LAND SERVICE, INC.

Appliction granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90—) and section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Sea-Land Service, Inc. (Sea-Land or Applicant) has applied for permission to waive collection of a portion of the freight charges on three shipments of plywood that moved from New Orleans, Louisiana to Bremen, Germany, under Sea-Land bills of lading dated February 20, 1976. The application was filed August 16, 1976.

The subject shipment moved under Gulf European Freight Association (GEFA) Agreement No. 9360–3, Tariff No. 2, FMC–2, 3d revised page 83–A, effective February 20, 1976, under the rate for the item "Lumber and timber, viz.: . . . Plywood, in bundles, cases or crates." The aggregate weights of the three shipments were 42,112 pounds (18.8 tons of 2240 pounds), 39,818 pounds (17.776 tons) and 39,818 pounds, respectively. The rate applicable at time of shipment was $101.75 per ton of 2240 pounds. The rate sought to be applied is $55.75 per ton of 2240 pounds. GEFA Agreement No. 9360–3, Tariff No. 2, FMC–2, 4th revised page 83–A, correction 340, effective February 26, 1976, for the item: "Lumber and timber, viz.: . . . Plywood, a/c Combi Line and Sea-Land."

Aggregate freight charges payable at the rate applicable at time of shipment amounted to $5,566.65, including wharfage. Aggregate freight charges at the rate sought to be applied amount to $3,066.65, including wharfage. The difference sought to be waived is $2,500. The Applicant is not aware of any other shipment of the same commodity which moved

[1] This decision became the decision of the Commission April 22, 1977.
[2] 46 U.S.C. 817, as amended.

via Sea-Land during the same time period at the rates involved in this application.

Sea-Land offers the following as grounds for granting the application:

(4)At the time of shipment, plywood was an open-rated commodity in Tariff No. 2, FMC–2, issued by the Gulf European Freight Association (GEFA) and applying from U.S. Gulf ports including New Orleans, to Continental European ports, including Bremen and Bremerhaven, Germany. For a period of time extending several months prior to February, 1976, Combi Line had maintained a rate on this commodity of $55.75 per ton of 2,240 lbs., whereas Sea-Land's rate to Bremen was $101.75 as shown on 3rd Revised Page 83–A (Attachment No. 1) and prior revised pages to this tariff and its predecessor—Tariff No. 1, FMC–1.

Sea-Land's sales department, negotiating in early February with the shipper was able to obtain a booking of several containerloads predicated on meeting the Combi Line's rate of $55.75. Booking was made for a sailing from New Orleans on or about February 20. On February 11 Sea-Land's pricing department followed through by giving verbal instructions to the GEFA office to reduce the Sea-Land rate to $55.75, effective as quickly as possible. Unfortunately, through clerical error, GEFA failed to file the reduced rate as requested. This failure to publish was discovered by Sea-Land on February 26. Immediate verbal instructions were then given to GEFA to rectify the oversight and telegraphic filing of the rate was made, effective the same date per 4th Revised Page 83–A (Attachment No. 2).

The clerical error by GEFA to publish the rate as originally instructed by Sea-Land is confirmed by letter dated July 20, 1976 by the chairman/secretary addressed to Sea-Land (Attachment No. 3). . . .

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 6(b), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent failure to timely file the reduced rate tariff, as had been promised the shipper.

[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Sea-Land filed a new tariff, which set forth the rate on which such waiver would be based.

4. The application was filed within 180 days from the date of the subject shipment.

Accordingly, permission is granted to Sea-Land Service, Inc. to waive collection of a portion of the freight charges, specifically the amount of $2,500.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
March 24, 1977.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 371(I)

WHITE-WESTINGHOUSE INT'L. CO. FOR N. V. TECHNISCHE HANDELMAATSCHAPPIZ

v.

SEA-LAND SERVICE, INC.

DISMISSAL OF PROCEEDING[1]

May 2, 1977

White-Westinghouse Int'l Co. (complainant) filed this informal complaint against Sea-Land Service, Inc. (respondent) which covers the movement of 84 cartons of household refrigerators weighing 20,639 pounds and measuring 3,523 cubic feet via respondent on the JACKSONVILLE, bill of lading number 901629225, on September 17, 1975 from New York, New York to N. V. Technische Handelmaatschappiz in Curacao, Netherland Antilles. On January 20, 1977 respondent consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304).

Complainant seeks reparations of $1,233.05 from respondent with respect to the subject movement, the rates for same being in the United States Atlantic and Gulf-Venezuela and Netherlands Antilles Conference, S.B. VEN 11, Freight Tariff F.M.C. No. 2. The claim was filed with the respondent on August 20, 1976, within two years from the date the cause of action arose, i.e., September 17, 1975 and must be considered on its merits as ruled by the Commission in *Colgate Palmolive Company v. United Fruit Company,* Informal Docket No. 115(I) served September 30, 1970.

The claim has already been settled between the parties by the submittal by respondent to complainant of a check dated January 31, 1977, in the amount of $1,233.05, the full amount of the claim. Complainant advised of the receipt of said check in its letter of March 21, 1977. For the sake of good order, the settlement involved the matters discussed below.

On September 2, 1976, respondent denied the subject claim, filed on

[1] Both parties having consented to the informal procedure of Rule 19, 46 CFR 502.301–304 (as amended) this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

August 20, 1976, referring to Item 11, 2nd Revised Page 12–B of the conference tariff which states:

"claims by shippers for adjustment of freight charges will be considered only when submitted to writing to the carrier within six months of the date of shipment."

This claim is not governed by the six-month rule, but by the two-year principle referred to in *Colgate Palmolive Company* v. *United Fruit Company, supra.*

The subject shipment was described on the bill of lading as 84 ctns. of electric h. h. refrigerators weighing 20,639 pounds, measuring 3,253 cubic feet. The tariff rate applies per ton of 40 cubic feet or 2,000 pounds, whichever produces the greater revenue. The rate assessed was on a measurement basis for 88.075 measurement tons. Item 490 of the conference tariff contains a contract rate to Curacao (Group A) of $58.50 per W/M ton for Household Refrigerators, K.D. which the respondent assessed, i.e., $58.50 (88.075)—$5,152.39. To this were added Landing, Storage and Delivery Charges to Curacao (Item 9 of tariff) on Cargo, N.O.S. of $11.00 per freight ton, i.e., $11.00 (88.075)—$968.83. The total freight and charges assessed complainant was $6,121.22.

Complainant based its complaint on lower rates and charges. Item 490 of the conference tariff also contains a contract rate to Curacao (Group A) of $50.00 per W/M ton for Household Refrigerators, S.U., which complainant states should have been assessed, i.e. $50.00 (88.075)—$4,403.75. To this complainant adds Landing, Storage and Delivery Charges to Curacao (Item 9 of tariff) on Cargo, in carrier's containers stripped by consignee at an off terminal location of $5.50[1] per freight ton, i.e. $5.50 (88.075)—$484.41. The total freight and charges complainant alleges that should have been assessed was $4,888.16.

Rates and charges assessed	$6,121.22
Rates and charges applicable per complainant	4,888.16
Amount of claim	$1,233.06

On December 13, respondent received the notice of our intent to process this claim. In its January 20, 1977 response, authorizing processing by a Settlement Officer, respondent advised:

"Upon investigation we find the claim to be in order for refund of $1,233.05 and are placing it in channels for payment."

In view of the prompt settlement of the claim by check dated January 31, 1977, after its filing with the Commission on November 12, 1976, it appears that the parties had no difficulty as to the facts involved. However, verification that the refrigerators were "set up" subjecting them to the lower rate appeared to be the only matter concerning which available information was incomplete.

[1] Attention is called to the fact that Landing, Storage and Delivery Charges assessed on Cargo, N.O.S. were $11.00 per freight ton. The same charges covering Cargo, in carriers' containers stripped by consignee at an off terminal location are only $5.50 per freight ton. (Item 9 of tariff)

In response to our inquiring, complainant advised by letter of March 31, 1977 that "household refrigerators we shipped are ready for use and, therfore, would be considered to be 'set up' per your statement of the 24th instance." Complainant further advised that it manufactured the household appliances it sold, and submitted a copy of the dock receipt and its invoice dated September 4, 1975 covering the subject shipment.

The invoice clarifies that the consignee was billed for 84 refrigerators, each packed in a separate carton. Fifty-one cartons measured 32" x 34" x 67", 19 cartons measured 34" x 32" x 63 ", and 14 cartons measured 34" x 34" x 66". These are definitely uniform measurements of refrigerators "set up".

Respondent has advised that a check for the full amount of the claim ($1,233.05) has been given to complainant, and complainant has acknowledged receipt of same. Accordingly, the proceeding is dismissed.

(S) JUAN E. PINE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 371(I)

WHITE-WESTINGHOUSE INT'L. CO. FOR N. V. TECHNISCHE HANDELMAATSCHAPPIZ

v.

SEA-LAND SERVICE, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

May 23, 1977

Notice is hereby given that the Commission on May 12, 1977 determined not to review the decision of the Settlement Officer in this proceeding served May 2, 1977.

By the Commission.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-62

PUBLICATION OF INACTIVE TARIFFS BY INDEPENDENT CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES

ORDER

May 2, 1977

This proceeding began with the issuance of an Order to Show Cause directed to 38 nonconference, nonvessel operating common carriers by water in the foreign commerce of the United States (Respondents). These carriers were directed to demonstrate that the tariffs they had filed with the Commission in fact described an active, *bona fide* offering of transportation services to the public, or suffer the cancellation of these tariffs.

Thirty (30) of the Respondents did not reply to the Show Cause Order and the Commission's invitation to submit supporting affidavits of fact and memoranda of law, contained therein.

Eight Respondents did file information of some type, but none of these even alleged that they were actively soliciting or providing common carrier services.

Imperial Van Lines, Wilson Container Co., Inc. and IASL Corporation have canceled the tariffs alleged to describe an essentially fictitious or suspended service, thereby mooting any controversy pertaining to said tariffs.

Transocean Container Service Co., Ltd., has stated that it wishes its tariffs to be canceled. This request shall be accommodated by the instant Order.

Requests for noncancellation were received from Trans-Globe Shipping Co. (Trans-Globe); Specialized Transportation Sales, Inc. (STS); Posey International, Inc. (Posey); and W.R. Zanes and Co. of Louisiana, Inc. (Zanes). A reply to these requests was filed by the Commission's Bureau of Hearing Counsel which favored cancellation of all but Zanes' tariff.

The Commission is of the view that neither Trans-Globe, STS, Posey

nor Zanes are performing as common carriers by water in the trades listed in the tariffs now under examination. It is misleading to the public, potentially unfair to competing carriers, and an administrative burden upon our staff, for "paper" tariffs to be kept on file, available for possible use if it should suit the narrow purposes of the persons issuing them to quickly enter the trade, but otherwise describing a nonexistent service. We construe such a situation as contravening the implicit requirements of Shipping Act section 18(b), subsections (1) through (3), which necessitate the prompt submission of accurate information concerning the services offered by a common carrier, including the suspension of all or any part of the operations described by its published tariffs. See *Embargo on Cargo, North Atlantic and Gulf Ports,* 2 U.S.M.C. 464, 465 (1940); *Intercoastal Schedules of Hammond Shipping Co., Ltd.;* 1 U.S.S.B. 606, 607 (1939); *Carriers Transporting Sugar from Virgin Islands to the United States;* 1 U.S.M.C. 695, 699–700 (1938); *Intercoastal Investigation, 1935,* 1 U.S.S.B. 400, 449 (1935).

Trans-Globe has, without explanation, amended its tariff to include Japan and South Korea in the range of ports served and substitute NOS rates for several specific commodity rates. Mere physical changes in a tariff cannot substitute for the performance of common carrier service. Until Trans-Globe intends to actively engage in such service, it should not maintain a tariff on file with the Commision. *Ghezzi Trucking, Inc.—Cancellation of Inactive Tariffs,* 13 F.M.C. 253, 255 (1970).

Posey states that it has been inactive as a common carrier because local ocean carriers do not publish Freight All Kinds (FAK) rates, but that one such carrier might begin accepting FAK cargo shortly. Until such time as Posey is actually able to perform as a common carrier, it too should not be permitted to maintain an inaccurate and incomplete tariff on file with the Commission. When and if the local ocean carriers publish a FAK rate, Posey can readily submit a current tariff.

STS states that it has been "quoting" from its tariff and is "in the process" of increasing some of its published rates. In the absence of evidence describing the exact nature and extent of this "quoting," we have no basis for concluding that STS is actively soliciting, what is more, offering common carrier services, and shall cancel its tariffs.

Zanes admits it is not an active common carrier, but states that it has been prevented from obtaining business by the International Longshoremen's Association's 50-mile container stuffing rule. Now that this rule has been overturned by the National Labor Relations Board, Zanes is "seriously considering" the activation of a common carrier service. As in the case of Posey, once Zanes is prepared to actually commence common carrier service, it may readily file a tariff describing the service and rates it will be offering at that time.

WHEREFORE, IT IS ORDERED, That the tariffs of the thirty-five carriers listed in the attached Appendix are hereby canceled, provided that this cancellation shall be without prejudice to said carriers filing new

tariffs when they are prepared to begin *bona fide* operations as common carriers in the foreign commerce of the United States.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-2

BORDEN INTERAMERICA INC.

v.

VENEZUELAN LINE

ORDER

May 13, 1977

In our January 10, 1977 Report and Order in this proceeding, we allowed the parties additional time in which to submit further evidence concerning (1) the standing of the Complainant to receive reparations and (2) the value of the goods shipped.

Complainant filed an "Amended Complaint" stating that its proper name was Borden Interamerica Inc., and that Borden Interamerica Inc. actually paid the freight charges for the disputed shipment.

Venezuelan Line filed a "Reply to the Amended Complaint" wherein it argued only that the terms of Borden's sales invoice bearing the incomplete date of –28–73 were not sufficiently clear to establish the precise value per ton of the chemicals shipped. Venezuelan Line also stated that the value designation applied at the time of shipment ($300 to $500 per ton) was based upon an Export Declaration provided to its Charleston, South Carolina, agent by an employee of the Complainant. The agent's copy of this document has been misplaced, however, and was not furnished to the Commission.

Complainant did not reply to these allegations or produce its copy of the Export Declaration. It has also failed to introduce evidence which corroborates or verifies the accuracy of the $217.14 per ton value indicated by the 1973 invoice.

In circumstances such as these, where critical information concerning a disputed shipment is entirely in the possession of the shipper, the Commission has consistently required clear proof that the original shipping documents were in fact erroneous before holding that the carrier has violated Shipping Act section 18(b)(3). In the absence of evidence corroborating the 1973 sales invoice or rebutting Venezuelan Line's statements that a higher value was stated by the shipper on Export

Declaration, the instant record does not permit us to conclude that the goods shipped had an actual value less than the $300 per ton specified on Venezuelan Line's bill of lading at the time of shipment.

Accordingly, IT IS ORDERED, That the Amended Complaint of Borden Interamerica Inc. seeking reparations based upon the value classification applied to its January 7, 1974 shipment of 105.62 short tons of Urea Formaldehyde (UF–85) is denied.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 495

UNIVERSAL NOLIN UMC INDUSTRIES, INC.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

May 11, 1977

No exceptions having been taken to the initial decision in this proceeding, and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on May 11, 1977.

It is Ordered, That applicant is authorized to waive collection of $870.19 of the charges previously assessed Universal Nolin UMC Industries, Inc.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket 495 that effective May 1, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from May 1, 1976, through June 25, 1976, the rate on 'Milk Coolers, with Refrigeration Equipment, including Fans' to Group 1 port is $66.50 WM, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 495

UNIVERSAL NOLIN UMC INDUSTRIES, INC.

v.

SEA-LAND SERVICE, INC.

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298), and section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Sea-Land Service, Inc. (Sea-Land or Aplicant), has applied for permission to waive collection of a portion of the freight charges on two shipments of milk coolers, which moved via Sea-Land's mini-landbridge service from New Orleans, Louisiana, to Tokyo, Japan, by way of Oakland, California (rail New Orleans to Oakland). The two shipments moved under Sea-Land bills of lading dated May 13, 1976. The application was filed November 8, 1976. Waiver of the charges involved herein would affect only the ocean carrier's portion.

The subject shipments moved under Sea-Land's westbound USA-Far East Joint Container Freight Tariff No. 234, FMC–106, ICC–92, item #719 1536 30, 3rd revised page 507, effective May 1, 1976. The aggregate weight of the two shipments was 22,270 pounds and their aggregate measurement was 3315 cubic feet. The rate applicable at time of shipment was $77 per ton of 40 cubic feet or 2000 pounds, whichever yields the greater revenue. The rate sought to be applied is $66.50 per ton of 40 cubic feet or 2000 pounds, whichever is greater; per the same tariff page as cited above, except see 7th revised page 507, effective June 25, 1976.

Aggregate freight charges for the two shipments payable pursuant to the rate applicable at the time of shipment amounted to $6,562.76, including handling charges. Aggregate freight charges at the rate sought to be applied amount to $5,692.57, including handling charges. The difference sought to be waived is $870.19.

[1] This decision became the decision of the Commission May 11, 1977.
[2] 46 U.S.C. 817, as amended.

Except for the four shipments involved in Special Docket 492 (*Toei Kogyo Co. v. Sea-Land*), the Applicant is not aware of any other shipments of the same commodity which moved via Sea-Land during the same time period at the rates involved in this application.

Sea-Land offers the following as grounds for granting the application:

(4) Sea-Land Tariff No. 234, FMC No. 106 and ICC No. 92, naming mini-landbridge rates from U. S. Atlantic and Gulf seaport cities to Far East ports, was a reissue of Tariff No. 201, FMC No. 74 and ICC No. 72, which became effective September 15, 1975. On original page 507 (Attachment No. 1) it brought forward without change a special rate of $66.50 W/M in Item No. 719 1536 30 applying to Japan Group 1 ports, including Tokyo as provided in Rule No. 5. This rate had initially been established to meet the same total rate published by a competing carrier in its mini-landbridge tariff. The rate was subject to an expiration date of January 31, 1976 as explained in Rule No. 10 on original page 86 (Attachment No. 2). The expiration date was subsequently extended to June 30 and July 31, 1976 on 1st revised page 507, 3rd, 4th and 5th revised pages 86 (Attachment No. 3).

In February, 1976 a shipper of milk coolers requested Sea-Land's sales representative to extend the $66.50 rate to December 31, 1976 so that he could continue to sell his products competitively with local Japanese manufacturers. The sales representative proposed this request by letter dated February 13, 1976 (Attachment No. 4). It was approved by Sea-Land's Pacific Division pricing headquarters in Oakland and the shipper so informed verbally on February 20. Instructions to publish the extension of the expiration date were teletyped March 30 to the Elizabeth, N. J. office for processing through the tariff publishing officer (Attachment No. 5).

Concurrently, Sea-Land was processing a general increase in rates to become effective May 1, 1976 in Tariff No. 234 corresponding to a similar general increase in all-water rates taken by the Far East Conference. Special rates which Sea-Land had agreed to maintain in effect to a date beyond May 1 were, of course, not to be subjected to a general increase. Unfortunately, due to administrative error, Sea-Land failed to except Item No. 719 1536 30 from the general increase and the rate of $66.50 was increased to $77.00 on 3rd revised page 507 (Attachment No. 6). On June 23 this error was discovered by pricing personnel and it was corrected by immediate filing of 7th revised page 507 (Attachment No. 7) with an effective date of June 25. The shipments here involved, (Attachment No. 8) moved during the period of time the erroneous rate of $77.00W/M was in effect.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 6(b), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment. [3]

[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent failure to except the subject commodity item from the general rate increase, as had been promised the shipper.

2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate upon which such waiver would be based.

4. The application was filed within 180 days from the date of the subject shipment.

Accordingly, permission is granted to Sea-Land Service, Inc., to waive collection of a portion of the freight charges, specifically the amount of $870.19. An appropriate notice will be published in Sea-Land's tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
April 14, 1977.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 492

TOEI KOGYO CO. LTD.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND AND WAIVER OF CHARGES

May 11, 1977

No exceptions having been taken to the initial decision in this proceeding, and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on May 11, 1977.

It is Ordered, That applicant is authorized to refund and waive collection of $953.67 of the charges previously assessed Toei Kogyo Co. Ltd.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket 492 that effective May 1, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from May 1, 1976 through June 25, 1976, the rate on 'Milk Coolers, with Refrigeration Equipment, including Fans' to Group 1 port is $66.50 WM, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That refund and waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the refund and waiver.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 492

TOEI KOGYO CO. LTD.

v.

SEA-LAND SERVICE, INC.

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298), and section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Sea-Land Service, Inc. (Sea-Land or Applicant), has applied for permission to refund a portion of the freight charges on one shipment of milk coolers, and to waive collection of a portion of the freight charges on three other shipments of milk coolers, all of which moved via Sea-Land's mini-landbridge service from New Orleans, Louisiana, to Tokyo, Japan, via Oakland, California (by rail New Orleans to Oakland), between May 4 and June 28, 1976. The four shipments moved under Sea-Land bills of lading dated May 4, May 18, May 28 and June 11, 1976, respectively. The application was filed October 29, 1976. Refund or waiver of the charges involved herein would affect only the ocean carrier's portion.

The subject shipments moved under Sea-Land's westbound USA-Far East Joint Container Freight Tariff No. 234, FMC–106, ICC–92, Item #719 1536 30, 3rd revised page 507, effective May 1, 1976. The aggregate weights of the four shipments were, respectively: 3329 pounds, 8850, 6350 and 8922 pounds. In the same chronological order, they measured 155 cubic feet, 1315, 1040 and 1123 cubic feet. The rate applicable at time of shipment was $77 per ton of 40 cubic feet or 2000 pounds, whichever yields the greater revenue. The rate sought to be applied is $66.50 per ton of 40 cubic feet or 2000 pounds, whichever is greater, per the same tariff page as cited above, except see 7th revised page 507, effective June 25, 1976.

[1] This decision became the decision of the Commission May 11, 1977.
[2] 46 U.S.C. 817, as amended.

Aggregate freight charges payable pursuant to the rate applicable at the times of shipment amounted to, respectively: $317.76 (inclu. handling charge), $2,531.38, $2,002.00, and $2,302.16 (inclu. handling charge). Aggregate freight charges at the rate sought to be applied amount to $277.07 (inclu. handling), $2,186.19, $1,729.00, and $2,007.37 (inclu. handling). The differences sought to be waived or refunded total $953.67.

There were only two other shipments of the same commodity which moved via Sea-Land during the same time period at the rates involved in this application. Those other two shipments are the subject of another Special Docket application (SD–495, *Universal Nolin UMC Industries v. Sea-Land*) because there the shipper, rather than the consignee, bore the freight charges and would be the proper beneficiary of any waiver of collection or refund. (That other application involves the same commodity, origin and destination, shipper and consignee.)

Sea-Land offers the following as grounds for granting the application:

(4) Sea-Land Tariff No. 234, FMC No. 106 and ICC No. 92, naming mini-landbridge rates from U. S. Atlantic and Gulf seaport cities to Far East ports, was a reissue of Tariff No. 201, FMC No. 74 and ICC No. 72, which became effective September 15, 1975. On original page 507 (Attachment No. 1) it brought forward without change a special rate of $66.50 W/M in Item No. 719 1536 30 applying to Japan Group 1 ports, including Tokyo as provided in Rule No. 5. This rate had initially been established to meet the same total rate published by a competing carrier in its mini-landbridge tariff. The rate was subject to an expiration date of January 31, 1976 as explained in Rule No. 10 on original page 86 (Attachment No. 2). The expiration date was subsequently extended to June 30 and July 31, 1976 on 1st revised page 507, 3rd, 4th and 5th revised pages 86 (Attachment No. 3).

In February, 1976 a shipper of milk coolers requested Sea-Land's sales representative to extend the $66.50 rate to December 31, 1976 so that he could continue to sell his products competitively with local Japanese manufacturers. The sales representative proposed this request by letter dated February 13, 1976 (Attachment No. 4). It was approved by Sea-Land's Pacific Division pricing headquarters in Oakland and the shipper so informed verbally on February 20. Instructions to publish the extension of the expiration date were teletyped March 30 to the Elizabeth, N. J. office for processing through the tariff publishing officer (Attachment No. 5).

Concurrently, Sea-Land was processing a general increase in rates to become effective May 1, 1976 in Tariff No. 234 corresponding to a similar general increase in all-water rates taken by the Far East Conferences. Special rates which Sea-Land had agreed to maintain in effect to a date beyond May 1 were, of course, not to be subjected to the general increase. Unfortunately, due to administrative error, Sea-Land failed to except Item No. 719 1536 30 from the general increase and the rate of $66.50 was increased to $77.00 on 3rd revised page 507 (Attachment No. 6). On June 23 this error was discovered by pricing personnel and it was corrected by immediate filing of 7th revised page 507 (Attachment No. 7) with an effective date of June 25.

The erroneous rate of $77.00W/M was in effect from May 1 through June 24. In addition to the shipment described in paragraph (1) (Attachment No. 8) on which permission to refund $40.69 is sought, there were three additional shipments as shown in Attachment No. 9 on which permission is sought to waive collection of a portion of the charges. The rate of $77.00W/M was assessed but the consignee paid charges based on the rate of $66.50W/M on each.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 6(b), *Special Docket Applications*, Rules of

Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent failure to except the subject commodity item from the general rate increase, as had been promised the shipper.

2. Such a refund or waiver of collection (respectively, where applicable for the subject four shipments) will not result in discrimination among shippers.

3. Prior to applying for authority to refund or waive collection of a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate upon which the respective refund and waivers would be based.

4. The application was filed within 180 days from the date of the subject shipment.

Accordingly, permission is granted to Sea-Land Service, Inc., to refund and waive collection, as applicable, of a portion of the freight charges, specifically in the total amount of $953.67 for the subject four shipments. An appropriate notice will be published in Sea-Land's tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
April 14, 1977.

[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

FEDERAL MARITIME COMMISSION

DOCKET NO. 73-79

HOUSEHOLD GOODS FORWARDERS ASSOCIATION OF AMERICA, INC., ET AL.

v.

AMERICAN EXPORT LINES, INC., SEA-LAND SERVICE, INC. U. S. LINES

Where different commodity descriptions are involved, economic injury is not demonstrated, and the choice of routing is entirely within the control of the underlying shipper, the mere fact that military household goods are transported at one rate when shipped directly by the Military Sealift Command and at another rate when a nonvessel operating common carrier intermediary is employed does not establish a violation of Shipping Act section 17, first paragraph.

Alan F. Wohlstetter, for Household Goods Forwarders Association of America, Inc.

James N. Jacobi, for American Export Lines, Inc.

Edward M. Shea, for Sea-Land Service, Inc.

Russel T. Weil, for United States Lines, Inc.

Dudley J. Clapp, Jr., *Milton J. Stickles, Jr.*, and *E. Duncan Hammer, Jr.*, for Military Sealift Command.

Donald J. Brunner and *C. Jonathan Benner*, Hearing Counsel.

REPORT AND ORDER

May 18, 1977

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett, Bob Casey and James V. Day, *Commissioners*)

In response to a petition by the Household Goods Forwarders Association of America, Inc. (HGFA), the Commission issued a Show Cause Order directing American Export Lines, Inc. (AEL), Sea-Land Service, Inc. (Sea-Land), and United States Lines, Inc. (USL), to demonstrate why the disparity between the rates at which containerized "military household goods" are shipped by the Military Sealift Command (MSC) and by privately owned nonvessel operating common carrier

(NVO) members of HGFA, between U.S. Atlantic and Continental European ports (MSC Trade Route 5), should not be declared unjustly discriminatory within the meaning of section 17 of the Shipping Act, 1916 (Act).

At the time this proceeding was commenced the rates Respondents charged MSC for household goods (MSC rates) were lower than the rates available to HGFA members (NVO rates) by some $100 to $300 per container without consideration of bunker fuel surcharges, and lower by about $90 to $400 per container if bunker surcharges were included in the calculations. The NVO rates were in turn considerably lower than the commercial rates.[1]

HGFA promptly entered a joint stipulation of facts with the respondent carriers. Among the stipulations were the following: Respondents had each unsuccessfully attempted to persuade MSC to remove household goods from the "Cargo, N.O.S." commodity classification and establish a separate MSC household goods rate; during RFP 800, 1st cycle, household goods constituted 9.1 percent of the items moving under MSC's, "Cargo, N.O.S." rate; Respondents' NVO rates are reasonable; transportation conditions do not warrant a substantial discrepancy between rates for military household goods shipped by MSC and those shipped by NVO's;[2] the NVO rate is available only for shipments covered by Government Bills of Lading; the Defense Department pays the total transportation cost for both NVO and MSC shipments; and, the Defense Department itself determines whether a given shipment moves via MSC or via a NVO.

In separately filed memoranda of law, Respondents focused on MSC's insistence that they carry household goods under a broad "Cargo, N.O.S." classification when they would prefer to establish a separate "Household Goods" rate.[3] It was argued that Respondents could not have violated section 17 because there is only one underlying "shipper,"[4] and they have merely acquiesced in a commodity classification scheme

[1] The rate data in the Commission's Show Cause Order was based upon MSC's RFP 800, 2nd cycle, bids (effective January 1, 1974) and all applicable bunker surcharges. MSC rates are established for six-month periods ("cycles") through a competitive bidding procedure (RFP System) which classifies *all cargo* other than refrigerated and vehicular items as "Cargo, N.O.S." These rates are expressed in dollars per measurement ton. The NVO rate is established by Respondents acting individually, but all three carriers express their rates as a flat charge per container (or in dollars per cubic foot for partial loads) and have quoted identical rates (except for bunker surcharges) since at least May 1, 1972. The NVO rate is available for all United States Government shipments; *it is not limited to household goods owned by Defense Department personnel*. The commercial rate is established by the North Atlantic/Continental and North Atlantic/French Freight Conferences. It is expressed in dollars per weight ton over a 6,720 lb. minimum. These different rating systems make rate comparison difficult. MSC and NVO rates can be accurately compared because a measurement ton is fixed at 40 cubic feet and the MSC tariff lists averages of the internal capacity of the containers used by each carrier. Comparison of the MSC or the NVO rate with the commercial (by weight) charge is more art than science. Educated estimates are possible if one knows the storage characteristics of household goods, but exact figures are impossible unless both weights and measurement figures are available on a specific shipment.

[2] The parties stipulated to MSC/NVO rate discrepancies based upon RFP 800, 2nd cycle, data *without bunker surcharges* and stated that these discrepancies were "substantial."

[3] MSC typically accepts bids on only three military commodities: "Refrigerated," "Vehicles" and "Cargo, N.O.S."

[4] Only AEL and USL make the "single shipper" argument. Sea-Land believes two shippers are involved, but suggests (without providing any particulars) that there are cost justifications for different MSC and NVO rates on household goods.

dictated by the Defense Department. *American Export Isbrandtsen Lines, Inc. v. Federal Maritime Commission*, 409 F.2d 1258 (2d Cir. 1969); *Violations of Section 14, Fourth, 16 First and 17 (Bunker Fuel Surcharges)*, 15 F.M.C. 92 (1972), as essentially reversed by order published at 13 S.R.R. 526 (1973).

Respondents also claimed that their lower MSC rates are justified in light of the mix of low and high valued items carried thereunder, the legality or reduced rates to the sovereign, and their compliance with the Commission's General Order 29.[5] Nonetheless, Respondents urge the Commission to take *prospective action* against MSC's use of the "Cargo, N.O.S." classification and re-establish the separate rate for military household goods which existed prior to 1966 when MSC switched to the RFP system.

Hearing Counsel and HGFA supported the Respondents in arguing that the stipulated facts present a *prima facie*, but "prospective only," violation of section 17.[6] Neither Respondents, HGFA nor Hearing Counsel exercised their right to request an evidentiary hearing.

The only discordant note was voiced by MSC, which had been granted leave to intervene. MSC objected strongly to what they viewed as the collusive nature of the proceeding, the inadequacy of the joint stipulation, and the other parties' apparent efforts to deprive MSC of an opportunity to rebut their allegations. MSC further stated that the real controversy is not a Shipping Act matter, but concerns a dispute between itself and HGFA as to the cost efficiency of NVO door-to-door service. In 1971 MSC began using direct procurement methods (the RFP system) to obtain inland drayage of household goods in conjunction with the line haul services of ocean carriers; it has subsequently increased its reliance upon this method of transport at the expense of the Through Government Bill of Lading or NVO method. MSC considered the claim that NVO rates are reasonable to be a sham in light of past HGFA contentions that these rates are too high. *E.g.*, HGFA Opening Brief in FMC Docket No. 73-22, *Matson Navigation Company—Proposed Changes in Rates*. MSC also stressed the absence of facts in the Joint Stipulation which show that Respondents have identifiable costs peculiarly attributed to the shipment of household goods which necessitate a special MSC household goods rate or that HGFA members have been injured by the rate disparities in question. MSC also subscribes to the "one shipper" theory on the grounds that the bifurcated military cargo rate system being investigated is entirely a product of Defense Department procurement regulations; the government pays the ocean freight in both instances.

Sea-Land thereafter filed a "Motion to Supplement the Record" stating

[5] 46 C.F.R. Part 549 prescribed a "fully distributed costs" floor for military cargo rates beginning with RFP 700 (January 1 through June 30, 1972). These regulations were affirmed *per curiam* by the United States Court of Appeals on December 19, 1974. General Order 29 has generally been effective in curbing unrealistically low military cargo rates in foreign commerce.

[6] Like Sea-Land, Hearing Counsel and HGFA believe there are two different shippers involved because the NVO's stand in the position of shippers in their relationship with the Respondents.

that the RFP 900, 1st cycle, rates were considerably higher than those relied upon in the Commission's Show Cause Order (RFP 800, 2nd Cycle), and, if bunker surcharges were omitted, the disparity between Sea-Land's own MSC and NVO rates would be under $60 for both 40 and 35 foot containers.

In February 1976, the Commission took official notice of the fact that RFP 1000, 2nd Cycle, MSC rates were then higher than Respondents' NVO rates (if bunker surcharges were excluded), and ordered HGFA to show cause why the proceeding should not be discontinued as moot.

HGFA responded by first arguing the facts. MSC rates change with each RFP cycle, and, according to HCFA, the critical problem is the continuation of *different* rates for different shippers of identical commodities, not the exact amount of the rate disparity or which of the shippers is favored.[7] HGFA then presented a lengthy supplemental argument against the invalidity of any discount to government shippers in light of the repeal of section 6 of the Intercoastal Shipping Act on October 26, 1974 (P.L. 93–487).

Hearing Counsel and Respondents also stated that the controversy was not moot so long as military household goods rates could be shipped under two different rates. However, Respondents felt it necessary to part company with HGFA on the section 6 issue. All three carriers filed replies emphasizing that the Defense Department is solely responsible for any disparities between MSC and NVO rates and that the repeal of section 6 affected only *domestic commerce rates*.

MSC also replied to HGFA's supplemental arguments. MSC stated that whatever the effect of section 6's repeal, it did not eliminate the Defense Department's obligations to procure ocean transportation under competitive conditions pursuant to the Armed Services Procurement Act, 10 U.S.C. 2304, *et seq.*, or require that government rates be identical to commercial rates in all respects. Finally, MSC claimed that if U.S. Government shippers must be treated as commercial shippers in all respects, it follows that foreign governments are also precluded from receiving special rates, even when they own the vessels carrying their goods.

Discussion and Conclusions

Inasmuch as rate disparities similar to those initially complained of continue to exist, this somewhat questionable "controversy" is not moot and must be resolved upon its merits. Because the Commission has not been presented with a clear case of two shippers of like traffic moving under the same circumstances and conditions being charged different

[7] HGFA also pointed out that by May 6, 1976, all three Respondents would have increased their NVO rates to a level higher than their MSC rates.

rates—to the detriment of one of them—we hold that the stipulated facts do not establish a violation of section 17 as a matter of law.[8]

All parties admit that the instant dispute is caused by the Defense Department's decision to ship some of its household goods via MSC and some via NVO's and to pay the entire transportation cost in either case. The tariffs Respondents publish to accommodate this practice are claimed to be unjustly discriminatory on their face, yet the relief demanded by HGFA and Respondents alike is not the interdiction of a separate "Government Household Goods" tariff which duplicatively includes military cargo, but the abolition of the "Cargo, N.O.S." classification by MSC—at least insofar as it includes household goods. Either approach would eliminate discrimination. The former would also lower the rate the NVO's must pay. The Commission has been furnished no basis for choosing one solution over the other or for making any finding of unjust discrimination.

Nothing in the record indicates that "MSC Cargo, N.O.S." and "Household Goods of Government Personnel Shipped by NVO's Under Government Bills of Lading" are not different commodities for rate making purposes. Although both include military household goods, each commodity description legitimately includes other items as well. The Commission has heretofore accepted MSC's use of a "Cargo, N.O.S." classification for a myriad of commercially shipped commodities, provided that the rates charged recovered the carriers' fully distributed costs. This approach at least partially reflects the national policies expressed in the Armed Services Procurement Act and the various cargo preference laws. Absent evidence that MSC "Cargo, N.O.S." is not a distinct "commodity," no discrimination can occur if it moves at different rates than some of the individual items (*e.g.* household goods) ordinarily included in MSC's total cargo mix.

HGFA would distinguish the instant case from the disparate Defense Department/State Department household goods rates approved by the Second Circuit in *American Export Isbrandtsen Lines, Inc., supra,* because here the United States Government operates through an NVO intermediary as to part of its shipments, thereby technically involving two shippers. It is true that NVO's are ordinarily treated as shippers in their dealings with ocean carriers. The special circumstances of this case indicate, however, that the HGFA members are not operating independently, but as the *alter ego* of the Defense Department. They are contractually limited to the use of a "military" rate available only on American Flag carriers when a Government Bill of Lading has been issued pursuant to a conscious choice of routing by the Defense

[8] P.L. 93-487 does not directly affect this conclusion. The repeal of Intercoastal Shipping Act section 6 means that rates and practices applicable to government and charitable cargoes must now be judged by the same standards as commercial cargoes; it does not forbid all differences in the treatment of government and commercial shipments. See, *Department of Defense v. Matson Navigation Company,* 20 F.M.C. ——, 17 SRR 1, 3-6 (1977). A carrier may *reasonably and fairly* accommodate the special needs of any shipper—including MSC.

Department. Two different shippers may well be present in this instance (MSC and the NVO's), but the real party in interest here is not injured by the different rates these "shippers" pay within the meaning of section 17.

Moreover, HGFA has not even attempted to demonstrate the amount of injury, if any, it is suffering as a result of MSC's use of a "Cargo, N.O.S." rate. HGFA concedes that Respondents' NVO rates are reasonable, and that its members are fully reimbursed for the cost of ocean freight by the Defense Department.[9] Based upon the Joint Stipulation, HGFA's objective in establishing a single government household goods rate does not appear to be the elimination of injury to its members, but to increase the amount of freight MSC must pay to Respondents. Such a result is unwarranted in light of General Order 29 and the record before us.

WHEREFORE, IT IS ORDERED, That the initial Order to Show Cause directed to American Export Lines, Inc., Sea-Land Service, Inc., and United States Lines, Inc., and the subsequent Order to Show Cause directed to the Household Goods Forwarders Association of America, Inc., are hereby dismissed; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) JOSEPH C. POLKING,
Acting Secretary.

[9] The fact that HGFA members are fully reimbursed only to the extent that they comply with MSC regulations may explain the uniformity in Respondents' individually established NVO rates over the past few years.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-64

STATES STEAMSHIP COMPANY FAR EAST/USA HOUSEHOLD GOODS TARIFF NO. 2 FMC-9

A foreign commerce tariff may be canceled immediately if the effect of the cancellation is to eliminate a service and not to raise the cost of that service.

A telex tariff cancellation notice received after the close of Commission business was effective upon receipt when no steps were taken to reject said notice within the next few business days.

Once accepted by the Commission, a tariff filing is valid and binding between shipper and carrier even if subsequently found to violate provisions of the Shipping Act or the Commission's Rules; it is not void *ab initio*.

Dillon E. Coker and *Peter Q. Nyce, Jr.*, for Military Traffic Management Command.

R. Frederic Fisher and *Barbara H. Buggert*, for States Steamship Co.

Alan F. Wohlstetter and *Edward A. Ryan*, for Household Goods Forwarders Association of America, Inc.

John Robert Ewers and *C. Douglass Miller* as Hearing Counsel.

REPORT AND ORDER

May 18, 1977

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett, Bob Casey and Clarence Morse, *Commissioners*)

The Military Traffic Management Command of the Department of Defense (MTMC) has petitioned the Commission to review the status of States Steamship Company's (States Line), Far East/USA Household Goods Tariff No. 2, FMC-9, and issue a declaratory order indicating whether this tariff has been canceled. MTMC alleges that such an order would resolve a pending dispute between itself and a number of nonvessel operating common carriers (NVO's) of used household goods employing an International Through Government Bill of Lading pursuant to contrac-

tual arrangements with the Department of Defense.[1] This dispute concerns the level of household goods rates offered by vessel operating carriers from the Far East to U.S. West Coast ports and Hawaii between May 1 and October 30, 1976. MTMC takes the position that the "lowest available" ocean rate was that quoted in Section I of States Line's FMC No. 9 tariff, and would have the Commission declare that this rate remained in effect until at least August 28, 1976.

Replies to MTMC's petition were submitted by the Bureau of Hearing Counsel (Hearing Counsel), States Line, and the Household Goods Forwarders Association of America, Inc. (Intervenor).[2] These parties claim Tariff FMC–9 was canceled on or before May 21, 1976 and that the "lowest available rate" for military household goods from that date forward was contained in the Trans-Pacific American Flag Berth Operators Freight Tariff No. 3, FMC–2, effective May 1, 1976.[3]

MTMC was permitted to reply to States Line, which had styled its reply as a "Motion to Dismiss." The controversy presented is entirely one of law; no relevant questions of fact are disputed.

BACKGROUND INFORMATION

States Line entered into a mutual transshipment agreement (FMC No. 9373) with Lykes Bros. Steamship Company, Inc. (Lykes), in 1965 and filed a tariff implementing this agreement to take effect May 28, 1965.[4] The *agreement* provided for the through carriage of miltary household goods which originated at various Far Eastern ports and were: (1) initially booked by Lykes, transshipped to States Line's vessels in Japan, and delivered to U.S. West Coast ports by States Line;[5] and (2) initially booked by States Line, transshipped to Lykes' vessels in Japan, and delivered to U.S. Gulf ports by Lykes.[6] The *tariff* designated these two transshipment services as Section I and Section II service, respectively, and specifically referred to Agreement No. 9373 in both instances. The tariff did not, however, contain rules clearly describing the details of the transshipment operation, nor was it expressly required to contain such rules by the Commission's tariff filing regulations.[7]

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[1] The NVO's provide service to MTMC under contracts which require adherence to a single factor through rate for a six month period, unless the NVO cancels its service upon thirty days notice. MTMC will not permit an upward adjustment of the NVO's rate unless the NVO establishes an *unavoidable increase* in its underlying costs. When the claimed increase is in the cost of the underlying ocean transportation, an upward adjustment is apparently allowed only when the *lowest available ocean rate* has increased.

[2] Intervenor is a non-profit corporation consisting of 68 NVO's who specialize in shipping used household goods. Some of these NVO's are under contract with MTMC in the Far East/U.S. West Coast trade.

[3] States Line is a member of the Trans-Pacific American Flag Berth Operators Conference (T-PAFBO). *T-PAFBO calls only at U.S. West Coast ports and Hawaii.* It does not serve U.S. Gulf Coast ports.

[4] Agreement No. 9373 called for States Line to file a *single tariff* stating the rates, charges and practices applicable to the transshipment service offered by *both* States Line and Lykes. Lykes had no tariff on file *in its own name* which included military household goods to West Coast ports, but was listed as a participating carrier in the States Line tariff as provided by section 536.4(10) of the Rules.

[5] States Line did not make direct vessel calls at U.S. Gulf ports between 1964 and 1977 as a condition of its subsidy arrangements with MARAD.

[6] Lykes did not make direct vessel calls at U.S. Gulf ports between 1964 and 1977 as a condition of its subsidy arrangements with MARAD. Lykes is not a member of T-PAFBO.

[7] 46 C.F.R. Part 536 (General Order 13).

In late 1975, States Line's original Household Goods Tariff was canceled and superseded by States Line's Tariff FMC–9. The title page of the latter document erroneously indicated that Agreement No. 9373 applied only to Section II service, and the tariff rules did not specifically clarify this discrepancy. Nonetheless, it was discernible from the tariff as a whole that both Section I and Section II service required some type of transshipment arrangement between originating and delivering carriers. States Line and Lykes were the only participating carriers listed in Tariff FMC–9; since Section I service involved delivery on the West Coast by a States Line vessel, it follows that this transshipment service could be offered only under a Lykes bill of lading.

On January 10, 1976, States Line and Lykes notified the Commission that they had canceled Agreement No. 9373. Without a properly filed agreement in effect, any further transshipments of military household goods by States Line and Lykes would have violated section 15 of the Shipping Act, 1916. Through oversight, however, States Line neglected to cancel Tariff FMC–9. Neither States Line nor Lykes moved any cargo under that tariff subsequent to January 10, 1976.

On May 17, 1976, States Line sent the Commission's Bureau of Compliance a telex commuication requesting special permission to cancel Tariff FMC–9 in its entirety effective May 18, 1976. No action had been taken on this request when another telex was received withdrawing the first message and stating that Tariff FMC–9 was canceled immediately. This second telex was received about 9:00 P.M., Friday, May 21, 1976, and was not seen by the Commission's staff until Monday morning, May 24, 1976. Such "temporary tariff amendments" are permitted by section 536.6(c) of the Rules. A permanent cancellation supplement to Tariff FMC–9 was filed July 29, 1976.

The Bureau of Compliance took no action to cancel or suspend Tariff FMC–9 on January 10, 1976, nor did it reject or disallow States Line's subsequent tariff filings purporting to cancel that tariff.

POSITION OF THE PARTIES

MTMC believes Tariff FMC–9 to still be in full force and effect, or, alternatively, that said tariff was not legally canceled until August 29, 1976. MTMC reaches this conclusion by contending that: (1) Agreement No. 9373 applied only to Section II service (States Line bookings delivered to the Gulf Coast by Lykes) so that cancellation of the Agreement did not affect the availability of Section I service (Lykes bookings delivered to the Pacific Coast by States Line); (2) the May 21, 1976 telex cancellation was a legal "nullity" because it caused military household goods rates to increase upon less than 30 days notice,[8] was

[8] Shipping Act section 18(b)(2) requires 30 days notice of rate increases. MTMC believes the cancellation of Tariff FMC–9 *increased* States Line's rates because States Line participated in T-PAFBO Tariff FMC–2 and the latter tariff contained a higher rate for the same service subsequent to May 1, 1976.

not followed by a permanent tariff amendment within 15 days[9] and was not simultaneously furnished to all States Line tariff subscribers;[10] (3) the July 29, 1976 permanent cancellation supplement was invalid because it improperly attempted to cancel the tariff retroactively; and (4) if the July 29, 1976 filing were validly accepted for filing by the Commission, it still resulted in a rate increase for household goods which could not take effect for 30 days.

States Line, Hearing Counsel and Intervenors believe Tariff FMC–9 was canceled by operation of law on January 10, 1976, when the underlying transshipment agreement was canceled, or, in the alternative, that the May 21, 1976 telex effectively canceled the tariff immediately. In support of this position, it is argued that: (1) Section I service was clearly dependent upon the continued existence of Agreement No. 9373, despite the absence of a specific statement to that effect on the title page of Tariff FMC–9; (2) the cancellation of Section I service did not result in a rate increase for Far East/U.S. West Coast household goods carried by States Line; (3) States Line's failure to file a permanent cancellation supplement by June 5, 1976 did not nullify its May 21, 1976 telex filing—as long as the cancellation notice remained on file it was controlling for all tariff filing purposes; and (4) there were no subscribers to Tariff FMC–9 upon which the May 21, 1976 telex filing could be served.

States Line and Intervenors also devote significant space to arguing that the Tariff FMC–9 rates were not actually "available" for use by the NVO's subsequent to January 10, 1976, regardless of the legal status of the tariff itself because States Line would have refused to provide the service.

Discussion and Conclusions

It is not the Commission's function to determine the "lowest available" ocean rate for MTMC purposes. Whether the rates specified in Tariff FMC–9 *would have been* made available to NVO's subsequent to the cancellation of Agreement No. 9373 is a matter for MTMC to resolve in accordance with its own statutes and regulations. The Commission will, however, render its opinion on the narrower question of whether Tariff FMC–9 has been canceled.

We believe Tariff FMC–9 was effectively canceled on May 21, 1976, and not before or after that date. The Commission's Rules do not provide for the automatic cancellation of transshipment *tariffs* upon receipt of notice that an underlying transshipment *agreement* has been canceled. The responsibility for maintaining accurate tariffs falls fully and solely upon the ocean carriers which publish them. As long as Tariff FMC–9 did not include an amendment or supplement which purported to cancel it,

[9] Section 536.6(c)(5) of the Rules requires a temporary tariff amendment to be followed by a permanent amendment within 15 days. States Line did not comply with this regulation.

[10] Section 636.6(c)(4) of the Rules requires carriers making temporary tariff filings to simultaneously serve the temporary filing on all subscribers to the tariff in question.

then Tariff FMC–9 contained the only legal rates States Line could have charged for the transshipment service covered by that tariff, even though the actual provision of such service would have violated section 15 of the Shipping Act. See generally, *Davis v. Portland Seed Company*, 264 U.S. 403, 425 (1924), and cases cited therein; *Chicago, Milwaukee, St. Paul and Pacific RR Co. v. Alouette Peat Products, Ltd.*, 253 F.2d 449 (9th Cir 1957).

The critical question is the effect of the May 21, 1976 telex cancellation. If a tariff cancellation would have increased States Line's rate for military household goods delivered to the *U.S. Gulf Coast* or *Lykes' rate* for military household goods delivered to the U.S. Pacific Coast, it could not have taken effect until June 20, 1976. The May 21, 1976 telex did not increase the rates for these services; it eliminated the services altogether.[11]

MTMC cites judicial decisions[12] for the proposition that the May 21, 1976 cancellation notice was invalid, even though accepted by the Commission, because a permanent tariff amendment was not filed within the 15 day period required by the Commission's Rules. These decisions find various agency actions taken in contravention of an agency's own regulations to be invalid, but are readily distinguishable from the tariff filing situation now facing the Commission. The cited cases deal with adjudicatory proceedings affecting significant operating or employment rights where due process is constitutionally required and scrupulously observed. The filing of common carrier tariffs involves a considerably different legal premise.

A tariff has one major purpose—to prevent rebates and other types of unjust discrimination by publicly stating the rates to be charged all eligible shippers. Tariff filings are neither adjudicatory matters nor finally determinative of individual rights or privileges. Once accepted by the Commission, a tariff must be adhered to by publishing carrier and shipper alike. *E.g. Gilbert Imported Hardwoods v. 245 Packages of Guatamabu Squares*, 508 F.2d 1116 (5th Cir. 1975); *United States v. Pan American Mail Line, Inc.*, 359 F. Supp. 728 (S.D.N.Y. 1972). Damage actions for illegal tariff provisions arise after the fact and are resolved by means of section 22 proceedings.[13] To *retroactively* declare a duly accepted tariff *void* for noncompliance with section 536.6(c)(5) would contravene the regulatory scheme established by most Federal common carrier statutes, including the Shipping Act. Once accepted, a tariff may be canceled only after the Commission has, after appropriate proceedings, found it to be

[11] The T-PAFBO rate (which applied to States Line and not Lykes) was admittedly higher than the FMC–9 Section I rate for service from the Far East to the U.S. West Coast, but Section I service required an initial booking on a *Lykes Bros. vessel*. Section I service was therefore an offering of Lykes Bros. and not States Line. It should also be noted that Section 536.2(c) of the Rules prohibits a carrier from filing a tariff which duplicates or conflicts with any other tariff to which the carrier is a party. If Section I service were a service of States Line and not of Lykes, Tariff FMC–9 would have improperly duplicated the West Coast service offered by States Line under the T-PAFBO tariff.

[12] *Ralph Nader v. Nuclear Regulatory Corp.*, 513 F.2d 1045, 1051 (D.C. Cir. 1975); *Pacific Molasses Co. v. Federal Trade Commission*, 356 F.2d 386 (5th Cir. 1966); *Mississippi Valley Barge Line Co. v. United States*, 252 F. Supp. 162 (E.D. Mo. 1966).

[13] Section 22 of the Shipping Act, 1916; 46 U.S.C. 821.

inconsistent with some provision of the Shipping Act or the Commission's Rules. Moreover, the Rules provide another, less drastic remedy for noncompliance with section 536.6(c)(5) which is plainly inconsistent with MTMC's "nullity" theory. Section 536.6(c)(7) states that temporary filing privileges shall be denied to carriers which persistently fail to file proper permanent amendments to replace their temporary tariff submissions.[14]

States Line has furnished an affidavit from its Rates and Conferences Manager stating that there were no subscribers to Tariff FMC–9 and that no violation of section 536.6(c)(4) could have occurred with regard to the May 21, 1976 telex cancellation notice. MTMC has not disputed this fact, but even if section 536.6(c)(4) had been violated, such a violation would not make the May 21, 1976 telex filing a "nullity." Once the temporary filing was accepted by the Commission,[15] it became legally binding upon States Line, Lykes, and any shippers of military household goods employing the service described therein.

Accordingly, IT IS ORDERED, That the "Petition for Declaratory Order" of the Military Traffic Management Command is granted to the extent indicated herein and denied in all other respects.

(S) JOSEPH C. POLKING,
Acting Secretary.

[14] See also section 32(c) of the Shipping Act [46 U.S.C. 831(c)] which provides for a civil penalty of up to $1,000 per day for violations of the Commission's Rules.

[15] The Commission's Rules do not indicate how or when a tariff submission is "accepted for filing," but provide for the rejection of tariff matter in certain instances. No notice or confirmation of acceptance is routinely furnished to carriers by the Bureau of Compliance. It is generally assumed that a tariff which is not rejected by the close of business on its stated effective date has been accepted for filing. Difficulties arise in the case of after hours telex filings such as States Line's May 21, 1976 cancellation notice. In such situations, the Commission must have a reasonable opportunity to review the filing, and a "rule of reason" has been applied. If the tariff submission is in proper form it is *accepted retroactively*. If significant errors exist, then the tariff is *rejected* as expeditiously as possible on the theory that it was never accepted and not on the theory that it was "void *ab initio*."

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 375(I)

NATIONAL STARCH & CHEMICAL CORPORATION

v.

SEA-LAND SERVICE, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

May 18, 1977

Notice is hereby given that the Commission on May 18, 1977 determined not to review the decision of the Settlement Officer in this proceeding served May 10, 1977.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 375(I)

NATIONAL STARCH & CHEMICAL CORPORATION

v.

SEA-LAND SERVICE, INC.

Dismissal of Complaint and Discontinuance of Proceeding.

DECISION OF RONALD J. NIEFORTH, SETTLEMENT OFFICER[1]

By complaint filed November 26, 1976, National Starch & Chemical Corporation (complainant) states that Sea-Land Service, Inc. (carrier) declined to honor a claim for freight overcharge of $124.44, on the grounds that such action would violate item 105 of the Leeward & Windward Islands & Guianas Conference Tariff F.M.C. No. 1 which prohibits the payment of overcharge claims not presented to the carrier within six months after date of shipment.

The complaint, which was served on the carrier November 30, 1976, prompted the carrier to respond on January 20, 1977, advising that its investigation disclosed that the claim for refund was in order. Subsequently, in letter of March 2, 1977, the carrier confirmed that a check in the amount of $124.44 dated February 2, 1977, had been sent to the complainant in settlement of the claim.

An analysis of the complaint and supporting documentation together with a review of the applicable conference tariff confirms the complainant's allegation relative to the assessment of an improper rate. The freight refund which has been made by the carrier in connection with this Docket is, therefore, found to be proper and indeed mandatory to satisfy statutory requirements as provided in Section 18(b)(3), Shipping Act, 1916.

The subject complaint is dismissed and this proceeding discontinued.

(S) RONALD J. NIEFORTH,
Settlement Officer.

[1] Both parties having consented to the formal procedure of Rule 19 of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from date of service thereof. (Note: Notice of determination not to review May 18, 1977.)

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 494

BRUNSWICK CORPORATION

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

May 18, 1977

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same notice is hereby given that the initial decision became the decision of the Commission on May 18, 1977.

It is Ordered, That applicant is authorized to waive collection of $1,007.50 of the charges previously assessed Brunswick Corporation.

It is further Ordered, That applicant shall promptly publish in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 494 that effective May 1, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from May 1, 1976, through June 1, 1976, the rate on 'Golf Clubs' to Group 1 Ports is $100,00 W/M, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 494

BRUNSWICK CORPORATION

v.

SEA-LAND SERVICE, INC.

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298) and section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Sea-Land Service, Inc. (Sea-Land or Applicant), has applied for permission to waive collection of a portion of the freight charges on three shipments of golf clubs, which moved via mini-landbridge service from Jacksonville, Florida, to Tokyo and Kobe, Japan, under Sea-Land bills of lading dated May 10, 1976. The application was filed November 4, 1976. Waiver of the charges involved herein will affect only the ocean carrier's portion.

The subject shipments moved via rail from Jacksonville to Oakland, California, then via Sea-Land to Japan. The shipments were moved pursuant to Sea-Land's filed tariffs covering shipments from U.S.A. to Japan, Sea-Land westbound U.S.A.—Far East Joint Container Freight Tariff No. 234, FMC–106, ICC–92, item #894 4210 00, 1st revised page 577, effective May 1, 1976. The three shipments had an aggregate weight of 27,502 pounds and measured 3,100 cubic feet. The rate applicable at time of the shipments was $113 (W/M) per ton of 40 cubic feet or 2000 pounds. The rate sought to be applied is $100 (W/M) per ton of 40 cubic feet or 2000 pounds; same tariff cited above, except see 2nd revised page 577, effective June 1, 1976.

Aggregate freight charges payable pursuant to the rate applicable at time of shipment amounted to $8,757.50. Aggregate freight charges at the rate sought to be applied amount to $7,750. The difference sought to be waived is $1,007.50. The Applicant is not aware of any other shipments

[1] This decision became the decision of the Commission May 18, 1977.
[2] 46 U.S.C. 817, as amended.

of the same commodity which moved via Sea-Land during the same time period at the rates involved in this application.

Sea-Land offers the following as grounds for granting the application:

(4) Sea-Land Tariff No. 234, FMC No. 106 and ICC No. 92, naming mini-bridge rates from U.S. Atlantic and Gulf seaport cities to Far East ports, carried a special rate of $100.00 w/M on original page 577, effective September 15, 1975 (Attachment No. 1) subject to an expiration date of July 31, 1976 as shown in Rule 10 on 6th Revised Page 86 (Attachment No. 2) and applying to Japan Group 1 ports including Tokyo as provided in Rule No. 5.

Commitment was made to the shipper to maintain the rate of $100.00 W/M without increase through December 31, 1976 per teletype of February 24, 1976 from our Chicago sales office to our Pacific Division pricing headquarters in Oakland (Attachment No. 3).

Concurrently, Sea-Land was processing a general increase in rates in Tariff No. 234 corresponding to a similar general increase in all-water rates taken by the Far East Conference. The increase was originally intended to become effective April 1, 1976 but actually became effective May 1. Special rates which Sea-Land had agreed to maintain in effect beyond that date were, of course, not to be subjected to the general increase. Unfortunately, due to administrative error, Sea-Land failed to except the special rate in Item No. 894 4210 00 from the general increase and the rate of $100.00 W/M was increased to $113 W/M on 1st Revised Page 577 (Attachment No. 4).

On May 13 this error was discovered by pricing personnel who sent a teletype message to the Elizabeth office requesting them to reinstate the $100.00 rate (Attachment No. 5). That rate was then reinstated on 2nd Revised page 577 effective June 1, 1976 (Attachment No. 6). Meantime, the three shipments involved herein had moved on May 10 and were assessed the then applicable rate of $113.00 W/M. Copies of each of the bills of lading and freight bill are enclosed as Attachment No. 7. Having been assured of the continuance of the $100.00 rate through December 31, the shipper's freight forwarder reduced the charges to the basis of that rate when paying the Sea-Land freight bills.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90-298), and Rule 6(b), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent failure to except the special rate from the general rate increase, as had been promised the shipper.

2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate on which such waiver would be based.

4. The application was filed within 180 days from the date of the subject shipments.

Accordingly, permission is granted to Sea-Land Service, Inc., to waive collection of a portion of the freight charges, specifically the amount of $1,007.50. An appropriate notice will be published in Sea-Land's tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
April 22, 1977.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 497

SMITH & JOHNSON (SHIPPING) INC.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

May 18, 1977

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on May 18, 1977.

It is Ordered, That applicant is authorized to waive collection of $4,681.35 of the charges previously assessed Smith & Johnson (Shipping) Inc.

It is further Ordered, That aplicant shall promptly publish in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 497 that effective May 21, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from May 21, 1976, through November 15, 1976, the rate on 'Pipe Fittings other than Brass or Copper (not including valves)' minimum 45 MT per container to ports in Spain is $34.00 W/M, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 497

SMITH & JOHNSON (SHIPPING) INC.

v.

SEA-LAND SERVICE, INC.

Application granted.

INITIAL DECISION[1] OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE

Sea-Land Service, Inc., seeks permission to waive collection of a portion of the freight charges on a shipment by Smith & Johnson (Shipping) Inc., of 46.35 metric tons of pipe fittings from New Orleans to Bilbao, Spain, on May 21, 1976. The rate applicable at the time of shipment was $135.00 per 2,240 pounds.[2] This rate resulted in aggregate freight charges of $6,319.53. The rate sought to be applied is $34.00 per 2,240 pounds.[3] This rate would have resulted in total freight charges of $1,638.18. Therefore, permission to waive collection of $4,681.35 is requested.

On or about May 14, 1976, Sea-Land's New Orleans office negotiated with the complainant a rate of $34.00 per ton of 40 cubic feet or 2,240 lbs. to meet competition of other carriers, for a containerload of Iron or Steel Pipe Fittings to be shipped May 21 from New Orleans to Bilbao, Spain. The existing effective rate was then $128.50 W/M named in Item 13360, plus 5% increase per 10th Revised Title Page, of Sea-Land's Freight Tariff No. 233, FMC No. 105. The negotiated rate of $34.00 W/M was confirmed with a booking of the shipment by a teletype message dated May 14 from the complainant to Sea-Land.

Sea-Land made telegraphic filing effective May 21 of the negotiated rate, but through clerical and administrative error the rate was named to

[1] This decision became the decision of the Commission May 18, 1977.

[2] Item No. 13360, Pipe Fittings (NOT including Valves) WM $128.50, Sea-Land Service, Inc., Tariff No. 233, FMC—105, FROM: United States Gulf Ports as Named in Item 40 TO: Ports in Spain as named in Item 40, Original Page 174, Effective Date April 5, 1975.

[3] Telegraphic filing. Pipe Fittings Other Than Brass or Copper (NOT including valves) Minimum 45 MT Per Container, WM $34.00. Same tariff of rates as above. Effective Date of Reduction when filed, i.e., November 15, 1976.

apply to Lisbon, Portugal, instead of Bilbao, and published in Item No. 30110 of Sea-Land's Tariff No. 162, FMC No. 40. When the erroneous publication was discovered, Sea-Land made another clerical error by telegraphic filing of a rate of $80.00 per ton of 2,240 lbs., instead of the agreed rate of $34.00 W/M, applicable to ports in Spain in Item No. 13360 on 3rd Revised Page 174 of Sea-Land's Tariff No. 233, FMC No. 105, effective July 21, 1976.

Freight charges on the shipment were calculated and billed to the shipper at the then effective tariff rate of $135.00 W/M for a total of $6,319.53, on Sea-Land's freight bill 031–705729. In paying the freight charges, shipper remitted $1,622.93 based on the agreed rate of $34.00 W/M. The amount paid is $15.25 less than the correct total charges that obtain from the agreed rate; Sea-Land is billing the shipper for this amount.

Telegraphic filing, effective November 15, 1976, has now been made of the agreed rate of $34.00 W/M, minimum 45 measurement tons, in Item 15735 on page 192 of Sea-Land's Tariff No. 233, FMC No. 105, applying from New Orleans to ports in Spain, including Bilbao.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications*, Rules of Practice and procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from the shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[4] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

[4] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

The Senate Report[5] states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

It is therefore found that:

1. There was an error due to inadvertence in failing to file a new rate.
2. Such waiver of collection of a portion of the freight charges will not result in discrimination among shippers.
3. Prior to applying for authority to waive collection of a portion of the freight charges, Sea-Land filed a new tariff which sets forth the rate on which such waiver would be based.
4. The application was filed within one hundred and eighty days from the date of shipment.

Accordingly, permission is granted to Sea-Land Service, Inc., to waive collection of a portion of the freight charges, represented by $4,681.35.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
April 25, 1977.

[5] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges*, under *Purpose of the Bill.*

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 498

UNION CARBIDE CORPORATION

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

May 18, 1977

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on May 18, 1977.

It is Ordered, That applicant is authorized to waive collection of $5,241.55 of the charges previously assessed Union Carbide Corporation.

It is further Ordered, That applicant shall promptly publish in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 498 that effective May 27, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from May 27, 1976, through July 23, 1976, the rate on 'Methyl, Methylthio Propionaldehyde' from Jacksonville to Marseilles, Minimum 17 WT per container is $65.00 W, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

(S) JOSEPHC. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 498

UNION CARBIDE CORPORATION

v.

SEA-LAND SERVICE, INC.

Application granted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

Sea-Land Service, Inc., seeks permission to waive collection of a portion of the freight charges on five shipments of Methyl, Methylthio Propionaldehyde by Union Carbide Corporation aggregating 3,574,740 pounds from Jacksonville, Florida, to Marseilles, France, under bills of lading dated June 1, 16, and 21 and July 6 and 13, 1976. The rates applicable at the time of shipment are alleged to be $76.75 W, Min. 15 WT per container and $65.00 W, Min. 18 WT per container. These rates resulted in total charges of $131,211.55. The rate sought to be applied is ocean rate $65.00 per ton of 2,240 pounds, minimum 17 tons per container. This rate would have resulted in total charges of $125,970.00. Permission to waive collection of $5,241.55 is sought.

On May 21, 1976, the Sea-Land sales representative obtained approval from Sea-Land's pricing personnel for a rate of $65.00 per long ton to apply from Jacksonville, Florida, to Marseilles, France, on Methyl Methylthio Proprionaldehyde, an insecticide bearing the trade name "Temik 5–G" shipped by the complainant. A minimum of 17 long tons per Sea-Land 35-foot container was attached to the agreed rate to be competitive with the quotation of $65.00 per long ton, minimum 18 tons, by a foreign flag carrier utilizing 40-foot containers. A confirming teletype, requesting publication and effective date of May 27 was sent by the sales representative to the pricing department the same day. However, the publication request to the tariff publication department, dated May 26 and specifying a telex filing to be effective May 27, went astray in transmittal

[1] This decision became the decision of the Commission May 18, 1977.

and was not received; therefore, the required tariff publication was not made.

Shipments of Methyl Methylthio Propionaldehyde began June 1 and five shipments moved before the failure to publish the agreed rate was corrected. These shipments were assessed the tariff rate then applicable as named in Item 3790 on 3rd revised page 77–B of Sea-Land Tariff No. 168–B, FMC No. 73. When the failure to publish the required rate was discovered, it was rectified by telegraphic filing of new Item 5047 containing the proper commodity description and rate, effective July 23, 1976, and published on 7th revised page 91 of Tariff 168–B.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications,* Rules of Practice and procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[2] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[3] states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

It is therefore found that:

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[2] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

[3] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges, under Purpose of the Bill.*

1. There was an error due to an inadvertence in failing to file a new tariff.

2. Such waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate on which such waiver would be based.

4. The application was filed within one hundred and eighty days from the date of shipment.

Accordingly, permission is granted to Sea-Land Service, Inc., to waive collection of a portion of the freight charges, represented by $5,241.55.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
April 25, 1977.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 499

LETRASET CONSUMER PRODUCTS INC.

v.

LYKES BROS. STEAMSHIP CO., INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND OF CHARGES

May 18, 1977

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on May 18, 1977.

It is Ordered, That applicant is authorized to refund $2,690.97 of the charges previously assessed Letraset Consumer Products Inc.

It is further Ordered, That applicant shall promptly publish in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 499 that effective December 1, 1975, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from December 1, 1975, through June 30, 1976, the non-contract rate on 'Powder, Molding, Papier Machze not exceed 100' per LT is $150.25 W, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That refund of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 499

LETRASET CONSUMER PRODUCTS INC.

v.

LYKES BROS. STEAMSHIP CO., INC.

Application granted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

By application filed December 1, 1976, Lykes Brothers Steamship Company, Inc., seeks permission to refund a portion of the freight charges on two shipments consigned to Letraset Consumer Products, Inc., aggregating 23,682 pounds or 821 cubic feet from Houston, Texas, to London, United Kingdom, on June 4 and 20, 1976. The rate applicable at the time of shipment was $208.50 per 2,240 pounds.[2] This rate resulted in aggregate freight charges of $4,279.46. The rate sought to be applied is $150.25 per 2,240 pounds. This rate would have resulted in total freight charges of $1,588.49. Therefore permission to refund $2,690.97 is requested.

When the general rate increase of December 1, 1975, was incorporated in the Gulf/U.K. Tariff No. 38 (FMC–17), the rate covering powder, moulding, papier mache was inadvertently dropped by the Gulf/U.K. Conference tariff filing clerk from 5th revised page 101 by clerical mistake in tariff compilation. This rate should have been simply carried forward with the general rate increases.

The clerical error by the Gulf/U.K. Conference tariff filing clerk of dropping the rate was discovered subsequent to the above mentioned shipments, Lykes then requested on June 29, 1976, the U.K. Conference members to file a rate of $150.25 per 2,240 lbs. thus reinstating the previously existing rate. This was approved effective June 30, 1976, and filed in Gulf/U.K. Tariff No. 38 (FMC–17) 6th revised page 101. The rate remained in effect at $150.25 per 2,240 lbs. through 9/30/76 at which time

[1] This decision became the decision of the Commission March 18, 1977.
[2] General Cargo, NOS, Gulf United Kingdom Tariff No. 38 (FMC–17).

it took a 8½% general rate increase and effective October 1, 1976, became the following:

	Contract	*Non-Contract*
Thru 9/30/76	$127.75/2240#	$150.25/2240#
Eff. 10/1/76	$138.50/2240#	$162.90/2240#

Lykes reproposed the $150.25 per 2,240 lbs. rate to the Gulf/U.K. Conference on 11/16/76 and it was approved by the Conference 11/16/76 and was filed and became effective November 18, 1976, therefore, from 12/1/75 until rates were re-filed on June 30, 1976, there was no tariff entry to cover this commodity other than General Cargo rate of $208.50 per 2,240 lbs. or 40 cuft, whichever results in greater revenue, which rate was assessed on shipments listed herein. Payment was received in the amount of $4,279.46, basis the General Cargo rate. Respondent believes no discrimination among shippers will result from the refund of $2,690.97 being granted, this refund representing the freight differential between the $150.25/2240# and application of the $208.50/2240# or 40 cubic ft. tariff rate. Respondent also agrees to publication of a notice or of such action that the Commission may direct, if permission to refund is granted.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications*, Rules of Practice and procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[3] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

[3] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Porion of the Freight Charges.*

The Senate Report[4] states the *Purpose of the Bill:*

[Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

The inadvertent failure of Lykes to extend the rate when it clearly intended to do so presents the kind of situation section 18(b)(3) was intended to remedy and requested waiver should be granted.

It is therefore found:

1. There was an inadvertent failure to include the intended rate in the published general rate increase;

2. The waiver requested will not result in discrimination among shippers;

3. Prior to requesting permission for the refund of a portion of the freight charges Lykes filed a new tariff setting forth the rate upon which the waiver would be based; and

4. The application was filed within 180 days of the date of shipment.

Accordingly, Lykes will be permitted to refund $2,690.70 to the Complainant.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
April 25, 1977.

[4] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges*, under *Purpose of the Bill.*

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ACCOUNTING REPORTS

The Commission's accounting regulations do not require carriers to maintain particular types of accounts or any uniform accounting system. General Order 5 (46 CFR Part 511) and General Order 11 (46 CFR Part 512) provide only that carriers using the uniform system of accounts prescribed by the Maritime Administration must file annual financial reports based upon that system. A carrier employing a different accounting system must thoroughly describe that system to the Commission. Petition for Declaratory Order of Matson Navigation Co., 462 (463).

Whether the capitalization of interest expended for vessel construction represents a "generally accepted accounting procedure" within the meaning of the rules applicable to the uniform system of accounts prescribed for subsidized carriers by MARAD (46 CFR Part 282.1 (359)) is a matter for the Maritime Administration, and not for the Commission, to determine. Id. (463–464).

Accounts or accounting methods acceptable to the Maritime Administration may be filed with the Commission in connection with annual accounting reports. Such annual financial reports do not themselves establish the validity of any revenue account, vessel investment account or total rate base calculation, but merely guide the Commission's staff in its regulatory responsibilities. The Commission's major concern with regard to such filings is that the methodology employed in preparing the reports be plainly identified. Id. (464).

The Commission's General Order 5 and General Order 11 regulations (46 CFR Parts 511 and 512) do not state whether interest expenditures incurred during vessel construction should be capitalized or whether "Interest During Construction Accounts" should be maintained. The Commission has accepted annual financial reports which included entries for capitalized interest on borrowed capital, and reports which did not. Id. (464).

AGREEMENTS UNDER SECTION 15: See also Section 19 Regulations; Terminal Leases

—In general

Terminal lease agreement between the City of Anchorage and Sea-Land Service, Inc., providing for a shift of Sea-Land's preferential berth from Terminal 1 to Terminal 2 on February 1, 1976 will not be temporarily approved. Severe icing occurs at Anchorage, and there is the real possibility that Totem's vessel could be damaged because of the mooring and weather conditions. Totem will not berth at Terminals 2 and 3 during the

severe icing conditions because of the risk to the vessel and her crew. If Totem cannot use POL-Terminal 1, even on a first-come-first-served basis, it may be forced to leave the trade, at least temporarily. Totem's refusal to use Terminals 2 and 3 is reasonable. Continuation of Totem's service to Anchorage is in the public interest and should be maintained if possible. Continued use of Terminal 1 by Sea-Land in a preferential basis is contrary to the public interest in violation of section 15 of the 1916 Act, in that there is a real possibility that it will serve to effectively preclude Totem from offering a competitive service during severe icing conditions. Therefore, the presently approved agreement between the City and Sea-Land which gives Sea-Land preferential berthing rights at Terminal 1 will be disapproved effective February 5, 1976, unless the parties, prior to that date, amend the agreement to provide that effective February 5, 1976, such preferential berthing rights shall not apply during the months of February through April 1976. Agreement Nos. T–1685, as Amended and T–1685–6: Between the City of Anchorage and Sea-Land Service, Inc., 69 (79–80).

Respondents, six Japanese flag-carriers seeking continuation of agreements, pursuant to which they cooperate among themselves so as to provide a coordinated fully containerized service between Japan and California, entered into those agreements to facilitate the transition from a breakbulk to a fully containerized service; respondents have recaptured the share of conference cargoes which they enjoyed prior to commencing the transition; and the conduct of respondents pursuant to the agreements has not been shown to have been unjustly discriminatory or unfair as between carriers. Agreements No. 9718–3 and 9731–5,351 (364).

The transpacific trades, through 1974, had a significant excess of capacity over cargo offered for carriage. Agreements among six Japanese flag-carriers for cooperation among themselves to provide a coordinated fully containerized service between Japan and California permit these carriers to offer the level of service which they considered competitively necessary with substantially less capacity than would be required for each carrier to individually offer that level of service. The agreements, therefore, tend to ameliorate the overtonnaging problem in the trades and tend to keep a high number of common carriers in those trades. Both of these results are beneficial to the public and outweigh the anticompetitive effects of the agreements sufficiently to justify continued implementation of the agreements until August 27, 1977, when they will terminate in accordance with amendments now before the Commission for approval. Consequently, the agreements are not contrary to the public interest or detrimental to the commerce of the United States. Id. (365).

The record does not show that agreements among six Japanese flag-carriers, pursuant to which the carriers cooperate among themselves so as to provide a coordinated fully containerized service between Japan and California, have resulted in unfairly depriving members of the Marine Cooks and Stewards Union of employment by U.S. flag-carriers in the trades. The decline in employment is the result of several factors, including modernization of the equipment used by the steamship companies employing the union members, the transfer of vessels previously employing union members to other trades, and the decline in the share of conference cargo carried by the steamship lines employing the union's members. The decline in the share of conference cargo was attributable in large part to the increase in the share carried by a steamship company which does not employ the union's members. Even though the success enjoyed by the Japanese flag-carriers has contributed to the decline in union employment, it was not proved that the agreements have been unjustly discriminatory or unfair as between carriers. Thus, the union did not prove that the agreements have unfairly deprived the union members of employment. Id. (366).

In a proceeding brought by one carrier against other carriers alleging the other carriers had entered into and implemented agreements which had not been submitted to the Commission for approval pursuant to section 15 of the 1916 Shipping Act, the questions of possible past section 15 violations could be considered apart from the complaint and would not bar dismissal of the complaint after the parties had entered into approved section 15 agreements resolving the private controversy. Refrigerated Express Lines (A/Asia) Pty. Ltd. v. Columbus Lines, 581.

Complaint by one carrier against other carriers alleging that they had entered into and implemented agreements relating to the carriage of meat from Australia which would give them exclusive rights in such trade in return for observing maximum rates set by the Australian Meat Board, and that those agreements had not been submitted to the Commission for approval pursuant to section 15 of the 1916 Shipping Act would be dismissed with prejudice. The parties had entered into agreements relating to such carriage, those agreements had been approved by the Commission, and it appeared that the private controversy between complainant and respondents had been terminated. Id. (582, 584).

The Presiding Officer properly dismissed as a matter of law the complaint of Lykes, a member of the Far East Conference, that the conference was violating sections 15, 14b, 14 Third, 16 First and 17 of the 1916 Shipping Act by implementing a modified and unapproved version of the conference agreements by failing to impose sanctions against its members who were minibridge carriers. Lykes is unable to make vessel calls at West Coast ports and the ability to call at such ports is necessary to engage in westbound minibridge service (U.S. Atlantic or Gulf Coast ports by rail to West Coast ports and thence by vessel to the Far East). The FEC may not itself engage in or prevent its members from engaging in any type of intermodal service without first receiving Commission approval of an express amendment to the conference agreement. Had the FEC acted to curb, encourage or regulate minibridge competition by its member lines, the lines joining in such action would have violated section 15 and possibly sections 14 Third and 14b of the Shipping Act. Lykes Bros. Steamship Co., Inc. v. Far East Conference, 589 (593).

Proceedings designed, inter alia, to codify in one rule the various general provisions regarding section 15 agreements is discontinued. Time and events have overtaken the original proposals. The more efficient procedure would be to fashion new rules for further comment. Section 15 Agreements Under the Shipping Act, 1916, 547.

—Antitrust Law

Respondent carriers, pursuant to agreements under which they cooperate among themselves so as to provide a coordinated fully containerized service between Japan and California, have reduced the level of competition among themselves. As such the agreements run counter to the policies of the U.S. antitrust laws. It is necessary, therefore, to examine what benefits, if any, the agreements confer upon the public, for the Commission will not approve an agreement if it invades the antitrust law policies more than is necessary to serve the regulatory purposes of the Shipping Act. Agreements Nos. 9718–3 and 9731–5, 351 (364).

—Assessment formula

The Administrative Law Judge erred in finding that the Commission has not already determined that the State Marine Group, consisting of 12 breakbulk lines, had been

overassessed by the New York Shipping Association for the period 1969–1971. The improper basis of assessment for the Puerto Rican carriers resulted in the underassessment of that group. It necessarily follows, since the total assessment obligation is fixed, that the States Marine Group was overassessed. The fact that the Commission did not, in earlier phases of the proceeding, require an adjustment of the tonnage/manhour basis upon which the Group's cargo was assessed, as was done with respect to automobiles, newsprint and Puerto Rican trade cargoes, does not mean that in implementing the Commission's order requiring adjustments of assessments the breakbulk carriers cannot be compensated for overassessments caused by the underassessments on the Puerto Rican carriers. Agreement No. T-2336—New York Shipping Association Cooperative Working Arrangement, 248 (253).

In computing any liability to the States Marine Group by the New York Shipping Association for overassessments for the benefits for longshoremen for the 1969–1971 period, account must be taken of any valid claims that reduce the size of the liability against which the Group's claims are to be offset. The present amount of such total liability, i.e., the underassessment of the Puerto Rican carriers for the 1969–1971 period has, by virtue of Commission approved settlement, been reduced by credits by NYSA to the automobile interests. As thus, reduced, the amount of overassessments is $689,599. Id. (253–254).

The States Marine Group's claim for overassessment by the New York Shipping Association for the benefit for longshoremen for the period 1969–1971 has not been satisfied by virtue of the Group's assessment treatment during the 1971–1974 and 1974–1977 assessment periods. Once liability has been established, it cannot be removed by contentions that, since assessments are raised continuously over successive periods, all periods must be considered in determining assessment liabilities. Id. (254).

Since payments are made for longshoremen benefit funds on a continuing basis over many assessment periods, it is arguable that liability to certain carriers for overpayment for earlier periods could be discharged by assessment reductions for later periods. Such is not the case with respect to overpayments made by the States Marine Group for the period 1969–1971 vs. alleged compensation because of increased payments by the Puerto Rican carriers for the 1971–1974 assessment period. The argument that such is the case rests on many assumptions none of which has been or can be proved in the context of the present proceeding. The weakest link in the argument is the assumption as to what would have happened with respect to the assessment for cargo in the Puerto Rican trade if the assessment formula for the period 1971–1974 had been litigated. The assessment formulas for Puerto Rican cargo for the 1971–1974 and 1974–1977 periods were approved in the context of settlements. Considerations underlying settlements do not necessarily coincide with the process of making findings on a record in a litigated proceeding. Since it cannot be shown that the Puerto Rican carriers were overassessed for the 1971–1974 periods, it follows, ipso facto, that the States Marine Group cannot be shown to have been underassessed by virtue of such overassessment. Id. (255–258).

The States Marine Group did not agree not to pursue and did not waive its claim against the New York Shipping Association for overassessments for the benefit of longshoremen for the 1969–1971 period. NYSA remains liable for the satisfaction of the claim. NYSA is itself an entity subject to the Shipping Act, 1916 and bears the responsibility to make such adjustments as are necessary to implement Commission approval of the assessment agreement. Id. (260).

Claim of the States Marine Group for interest as part of the outstanding liability of the New York Shipping Association for assessment overpayments by the Group for the period 1969–1971 is denied. Whether to grant interest is a matter for Commission discretion and neither equity nor promotion of effective regulation requires such grant

here. NYSA has not engaged in any conduct which it should have known was improper at the time, has not been shown to have improperly delayed the proceeding, and did not hold but promptly paid over the assessments it collected for the use and benefit of ILA which was their intended and proper purpose. Id. (261).

Complaints by carriers relating to the authority of the New York Shipping Association to raise the level of assessments on excepted cargoes are dismissed as moot following a Commission decision in a related proceeding. Transamerican Trailer Transport, Inc. v. New York Shipping Association, Inc, 739 (740).

—Monopoly

The relevant market for purposes of determining whether respondents, six Japanese flag-carriers seeking continuation of agreements, pursuant to which they cooperate among themselves so as to provide a coordinated fully containerized service between Japan and California, have a monopoly cannot be geographically less than the U.S. Pacific Coast. Respondents are liner operators. In addition to the liner operators which are members of the Trans-Pacific Freight Conference of Japan and/or the Pacific Westbound Conference, at least ten other carriers provide liner services between Japan and the U.S. Pacific Coast. To determine respondent's share of the relevant market it is necessary to consider the carryings of all liner operations in that market, both conference and nonconference. The record is insufficient to support a finding that respondents have a monopoly of the relevant market because it is not possible to determine the share which respondents have of any market greater than the inbound conference trades. Agreements Nos. 9718–3 and 9731–5, 351 (356–358).

—Pooling agreements

Petitioner, the Marine Cooks and Stewards Union, failed to prove that an agreement among six Japanese flag-carriers to pool revenues in the trade between the Pacific Coast of the United States and Japan is unjustly discriminatory or unfair as between carriers. The Commission had previously held that petitioner failed in its proof and no further evidence bearing on monopoly or unfairness was adduced. Agreement No. 10116–1—Extension of Pooling Agreement, 595 (597).

Petitioner, the Marine Cooks and Stewards Union, failed to prove that an agreement among six Japanese flag-carriers to pool revenues in the trade between the Pacific Coast of the United States and Japan resulted in the strongest member sustaining the weakest which would have otherwise failed, or resulted in the members increasing their share of the conference trades. Id. (597–598).

—Rates

Agreement granting the Pacific Westbound Conference authority to fix intermodal rates is approved for 18 months on condition that the agreement be modified to permit member lines to individually offer intermodal service not only as to minibridge but as to interior intermodal as well until such time as the conference implements the authority granted to it by the filing of appropriate tariffs. Agreement No. 57–96, Pacific Westbound Conference—Extension of Authority for intermodal Service, 289 (295, 307).

Aside from the fact that the Far East Conference's proposal to control minibridge is inconsistent with its existing authority and would at the very least require a major amendment to the FEC agreement, FEC failed to present any convincing arguments why it, rather than the Pacific Westbound Conference, should be adjudged to be the

"appropriate" conference to exercise westbound minibridge jurisdiction to the Far East. Id. (296–297).

Agreement granting the Pacific Westbound Conference authority to fix intermodal rates as to minibridge and interior intermodal is justified by the need to eliminate multiple tariffs and desirability of uniformity of tariffs, and by the potential for rate instability and malpractice which exists in the trade by reason of the fact that the trade is overtonnaged. Id. (298–299).

By restricting and precluding individual member lines from publishing tariffs for through intermodal transportation and fixing the rates and charges at which such transportation will be offered, agreement of the Pacific Westbound Conference constitutes a clear illegal restraint of trade. As such, the agreement is contrary to the public interest unless it can be shown to be justified or warranted in terms of legitimate commercial objectives. The Conference must demonstrate that the agreement serves a serious transportation need, is necessary to secure important public benefits or is in furtherance of a valid regulatory purpose of the Shipping Act. Id. (299).

Argument that conference ratemaking agreements are somehow immune from the approval standards of section 15 of the Shipping Act, including the public interest considerations of *Svenska*, is wholly inconsistent with the clear language of section 15 itself. Section 15 explicitly requires that the Commission subject to its approval requirements "any agreement" which provides for one or more of the activities specifically set forth in the seven categories enumerated therein, one of these being the "fixing or regulating of transportation rates." All conference ratemaking arrangements are subject to the approval standards of section 15. Id. (299–300).

While all conference ratemaking agreements are required to meet the standards for approval set forth in section 15, the extent of the justification that need be shown for such approval will vary from case to case with the intensity of the otherwise "illegal restraint" involved. Thus, the "legitimate commercial objectives" which the Commission will accept as evidencing the necessity for the restraint will generally be determined by the type and scope of the agreement under consideration. The Commission does not agree that, because of the intermodal aspects of the instant agreement, "the most stringent proof of a serious transportation need" is required. Id. (300–301).

The Commission has generally found agreements giving conferences intermodal ratemaking authority to be in the public interest. These types of agreements are generally acceptable. However, such agreements will not be summarily approved merely because similar agreements have been found warranted and have been approved under section 15 in the past. The Commission will not abdicate its responsibility to assure that the conduct legalized by such agreements does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purpose of the statute. Id. (301).

Applying the standards of section 15 as interpreted in *Svenska*, approval of agreement giving the Pacific Westbound Conference authority to fix intermodal rates is required by a serious transportation need and will serve to secure important public benefits. There are some definite legitimate objectives to be derived from approval, one of which is elimination of the multiplicity of minibridge tariffs which exists under the present system of allowing each PWC member to file its own individual tariff. The single most important public benefit derives from the advantage that conference authority over intermodal rates will offer. The intermodal movement of cargoes, allowing for continuous movement under a single bill of lading with less handling, provides an essential transportation service to shippers and consignees. The conference system provides the manner by

which the development of intermodalism can be most effectively accomplished in the individual trades. Uniformity of tariff rules is one of the desirable benefits that can be expected to result from approval. Clearly, conference authority over intermodal rates and traffic is an important public benefit that militates in favor of the approval of intermodal activity. Id. (301–303).

In addition to the clear and present benefits that can be derived from an agreement authorizing the Pacific Westbound Conference to fix intermodal rates by virtue of the elimination of multiple intermodal tariffs, approval of the agreement is also warranted by transportation circumstances and therefore will serve to fulfill a transportation need. Although the conference did not demonstrate any present rate instability or malpractice, there is a definite potential for both. The trade is overtonnaged and overtonnaging invariably gives rise to rate stability and malpractices. The threat to stability which can be expected to continue as minibridge grows, coupled with the disadvantages inherent in a multi-tariff system, fully support conference jurisdiction over intermodal tariff and traffic, both interior and minibridge. Id. (303).

Interior intermodal presents an equal if not greater threat to rate stability than does minibridge if only because the volume of cargo potentially available in intermodal operations from the industrial heartland of the United States exceeds the volume involved in minibridge. Likewise, the multiplicity of tariffs can be expected to present even greater difficulties than with minibridge because of the number of tariffs involved. Under the circumstances, there is no reason or regulatory purpose to be served by limiting the Pacific Westbound Conference's intermodal authority to minibridge. Id. (304).

Failure of the Pacific Westbound Conference to expeditiously publish an interior intermodal tariff could deprive the shipping public of benefits which it might otherwise receive if a member line published an intermodal tariff. Accordingly, the conference will be required to modify its agreement giving it authority to fix intermodal rates to permit member lines to individually offer intermodal service not only as to minibridge but as to interior intermodal as well until such time as the conference implements the authority granted to it by the filing of appropriate tariffs. Id. (304).

The Commission cannot itself modify the agreement of the Pacific Westbound Conference giving it authority to fix intermodal rates without the unanimous approval of the member lines, including those lines which had no part in the original submission of the agreement. The Commission's standing to amend or modify an agreement under section 15 is always subject to the subsequent acceptance of the amendment or modification by the parties thereto. However, the Commission is not powerless to rectify a situation created when a single conference member line consistently frustrates the wishes of the vast majority by continually casting a dissenting vote. Id. (305).

— Voting rules

Where conferences submitted to the Commission for approval proposed amendments to their agreements, which had been unanimously adopted by the conferences' members as required; a prospective member of the conferences objected to the amendments; and later, on becoming a member of the conferences, the carrier pursued its objections and filed protests with the Commission which ordered an investigation and hearing, the Presiding Officer erred in discontinuing the proceeding on the ground that the new carrier member had destroyed the required unanimity and thus there were no agreements before the Commission to approve. The entry of a new conference member does not invalidate a prior unanimous conference action, even though that action has not yet received Commission approval. However, failure of any party to the proceeding to file

exceptions to the Presiding Officer's ruling was tantamount to acquiescence and is construed as an effective withdrawal of the amendments from Commission consideration, and, therefore, the proceeding is discontinued. Agreement No. 8080–11, Amendment to the Atlantic and Gulf/Indonesia Agreement, 500 (502–503).

COMMON CARRIER: See also Jurisdiction

Although neither section 1 of the Shipping Act, 1916 nor section 5 of the 1933 Act defines the term "common carrier," it has long been held that this term means the common carrier at common law. The determination of common carrier status can be made by reference to a number of indicia, e.g., variety of cargo carried, number of shippers, type of solicitation, regularity of service, port coverage, responsibility toward the cargo, issuance of bills of lading, etc. It is not necessary that a carrier's operations encompass every one of these factors. Possible Violations of Section 18(a) of the Shipping Act, 1916, and Section 2 of the Intercoastal Shipping Act Arising from Charging Higher Rates than Specified by Current Tariff, 43 (50).

The fact that a carrier does not itself own or operate transportation equipment does not destroy its common carrier status. The Commission has recognized the so-called nonvessel operating common carrier, a common carrier publishing a tariff and offering a transportation service to the shipping public who neither owns nor operates vessels or motor vehicles. Id. (51).

A nonvessel owning carrier which offered to the general public a coordinated transportation service, including consolidation at its terminals, transportation by water and distribution to consignees in Hawaii, with the shippers having no authority to alter the service, was not merely a shipper's agent. Such operation is that of a common carrier subject to the provisions of section 18(a) of the Shipping Act, 1916, and section 2 of the Intercoastal Shipping Act. Contention that disclaimer of liability in its tariff or bill of lading signified that its service was not that of common carriage was without substance. The carrier honored some claims and shippers were not aware of the disclaimer. Even if the carrier had fully implemented the disclaimer provision, this fact alone had no legal significance in determining carrier status. Liability is imposed by law. Id. (53, 56).

The reason why assumption of liability need not be included in any definition of common carriage is that once a person holds himself out generally to carry for hire for whomever wishes to employ him, he has undertaken the occupation of a common carrier and liability will be imposed on him as a matter of law. So strict is this doctrine that a common carrier's liability has been likened to that of an insurer. Id. (55).

At the common law, a tender of cargo consisted of an unconditional offer to perform, coupled with a manifested ability to carry out the offer, and production of the subject matter of the tender. Dow Chemical International, Inc. v. American President Lines, Ltd. 531 (537).

A sequence of events whereby a shipper presented its containers at the entrance to a carrier's terminal yard, was given a pass, and was directed to the carrier's container yard, did not constitute an offer to deliver the container, and thus was not a tender. However, tender of the container did occur when the shipper arrived at the gate to the carrier's container yard and offered the carrier the bill of lading for the container. Arrival at the gate and offer of the bill of lading constituted an offer to deliver the container, the shipper had the container at the gate, and had there the ability to deliver the container to the carrier. Id. (537).

COMPLAINTS: See also Jurisdiction

It is one thing to permit an amendment to a complaint which merely affixes a notary's seal, adds a supporting sworn statement, or alters the type of relief requested without changing the essential nature of the cause of action or the respondents involved. It is something else to name a totally different respondent. The latter "amendment" constitutes a new proceeding and goes beyond the type of amendments permitted by Rule 502.70. Trane Co. v. South African Marine Corp. (N.Y.), 374 (384).

Amendments to complaints are liberally permitted under the Commission's rules so as to protect rights which might expire under the two-year period of limitations contained in section 22 of the Shipping Act. However, amendments which do not merely add parties having a community of interest with an original complainant to a suit properly brought, but substitute parties, especially when such parties are jurisdictionally indispensable, are not merely clarifying amendment but new complaints which should be so treated despite the possible effects of the period of limitations. Id. (385).

The GSA and other government agencies are "persons" under section 16 First of the 1916 Shipping Act. Such treatment is not only appropriate and consistent with public policy but is also in keeping with the Commissions longstanding practice of treating such agencies as "persons" for the purpose of filing a complaint under section 22 of the Act. Freight Forwarder Bids on Government Shipments at United States Port—Possible Violations of the Shipping Act, 1916, and General Order 4, 619 (622).

DEVICES TO DEFEAT APPLICABLE RATES

A freight forwarder did not violate section 16 of the 1916 Act when it allegedly breached its duty to its principal by preparing shipping documents describing the goods in a manner contrary to the principal's express instructions, with the result that a higher rate was charged for the shipments. The principal, a shipper, was unable to show any competitive relationship with any other shipper. The forwarder was not under an "absolute obligation" to follow the instructions of its principal. What the shipper is alleging under the color of section 16 is a violation of an agent to its principal under common law principles. The Commission has no jurisdiction over such a claim. Further, were the Commission to espouse the sort of duty allegedly owed by the agent to its principal, compliance by a forwarder with such a duty could well result, in itself, in a violation of the Shipping Act. European Trade Specialists v. Prudential-Grace Lines, 148 (152–154).

DISCRIMINATION: See also Freight Forwarding; Section 19 Regulations

Carrier did not violate section 16 of the 1916 Shipping Act by discriminating in favor of Norfolk forwarders and against forwarders in ports and at airports. In this case the forwarder was selected by the shipper. As to alleged discrimination in favor of another shipper, there was no evidence that the carrier had ever carried cargo for that shipper. European Trade Specialists, Inc. v. Prudential-Grace Lines, Inc., 148 (158).

Not all preferences or advantages offered by carriers are condemned by law, but only those that are unjust or unreasonable violate the Shipping Act, 1916. Moreover, the existence of unjust discrimination or prejudice must be demonstrated by substantial proof. Port of Houston Authority v. Lykes Bros. Steamship Co., Inc., 192 (199).

Proceeding instituted by order to show cause for the purpose of eliminating inbound/outbound rate disparities in the U.S. North Atlantic/Continental European trade is discontinued. Many of the items of alleged disparity had been eliminated, or it was

shown that no meaningful disparity existed. Some items of disparity remained considering the length of time since institution of the proceeding and the real possibility that subsequent rate actions have either eroded previous remedial rate actions, created new disparities on other items or eliminated disparities, continuation would serve little useful purpose. The Commission will use other approaches whereby meaningful disparities can be identified and eliminated. Publication of Discriminatory Rates in the U.S. North Atlantic/Continental European Trade, 477.

The intent of Congress in repealing section 6 and amending section 5 of the Intercoastal Shipping Act of 1933 was to require that the rates on government cargoes be established on the same basis as commercial rates. The government is no longer statutorily entitled to reduced rates, but must justify such rates on valid transportation factors. While the repeal of section 6 does not preclude as a matter of law a separate simplified rate system for military cargoes, such a rate structure must be based on valid transportation factors. Department of Defense and Military Sealift Command v. Matson Navigation Co., 503 (507).

DUAL RATE CONTRACTS

The sounder interpretation of the 1961 changes to the Shipping Act, 1916, and the one which is more fully supported by the legislative history is that section 14b(2) ("whenever a tariff rate for the carriage of goods under contract becomes effective . . . it shall not be increased before a reasonable period, but in no case less than ninety days") is a notice provision governing the filing of rates covered by a dual rate contract, and section 18(b)(2) is a notice provision limited to the filing of noncontract rates. The contract rate need not be in effect for 90 days before a rate increase can be made effective. Petition of North Atlantic French Freight Conference, 660 (669–672).

ENVIRONMENTAL IMPACT STATEMENT

Environmental issues relating to the matter of approvability of preferential berthing agreements at Anchorage do not constitute a major federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969, and preparation of a detailed environmental impact statement is not required. Agreement No. T–1685, as Amended, and T–1685–6: Between the City of Anchorage and Sea-Land Service, Inc., 440 (459).

FREETIME AND DEMURRAGE: See Truck Detention

FREIGHT FORWARDING

A licensed ocean freight forwarder must be independent. He cannot be one who is directly or indirectly controlled by a shipper. The Commission has consistently and unequivocally held that one who is employed by a shipper is not independent within the meaning of the 1916 Shipping Act and therefore cannot be licensed or continue to hold a license as a freight forwarder. Cleto Hernandez R. dba Pan Inter, 104 (108).

No weight can be given to the proposition that the holder of a freight forwarding license having no shipper connection at the time of licensing has a right to the continuation of that license when a subsequent connection arises. It is immaterial that such control arises after a license is issued rather than prior to an application therefor. Shipper control negates the Commission's authority not only to issue a license in the first instance, but to allow it to continue, regardless of any conditions that the licensee may propose. Id. (109).

Whenever a shipper connection is found to exist, that relationship alone is sufficient to revoke a freight forwarder license, notwithstanding any other merits or demerits of the particular forwarder involved. Id. (109).

A freight forwarder who failed to remit money to a shipper and entrusted to him by a consignor until more than five months after that money was due and owing, and who apparently did not have sufficient funds to remit that money during the five month period, was not qualified to remain a freight forwarder. There was overwhelming evidence that the licensee had used the funds for his personal requirements during that time. Id. (110, 111).

The phrase "fit, willing and able to carry on the business of forwarding," as set forth in section 44(b) of the 1916 Shipping Act, means that a forwarder is unfit and unable to perform his duties when he uses funds entrusted to him for uses not intended or fails to pay bills incurred in connection with the freight forwarding activities. These standards pertain not only to complete independence from shipper control, the ability to pay bills and properly use funds entrusted to him by others, but also means that a forwarder must act with the highest degree of business responsibility and integrity. Id. (111).

It is well established that the burden of proof in a freight forwarder licensing proceeding is on the applicant. The plain language of section 44(b) of the 1916 Shipping Act indicates as much by providing that a forwarding license shall only issue if the Commission finds that the applicant meets the statutory criteria and that "otherwise such application shall be denied." By applying for its initial federal license as an independent ocean freight forwarder an applicant seeks to change the status quo, and it has been held that the burden of proof in administrative proceedings falls upon the party seeking to change the status quo. Lesco Packing Co., Inc., 132 (136).

An applicant for an independent ocean freight forwarder license was under no obligation to secure counsel to represent itself in the application proceedings, and that portion of the initial decision denying the application which relied on the applicant's clumsiness in representing itself pro se was erroneous. Id. (137).

An applicant for an independent ocean freight forwarder license whose principal had engaged in a course of misconduct over the years lacked the character qualifications to be a licensee. The principal had been found guilty of violating the Bills of Lading Act; had made knowing and false statements to the Commission on a freight forwarder license application; had falsely obtained grandfather rights in violation of section 44(a) of the 1916 Shipping Act; his firm has been denied export rights by the Department of Commerce because of the improper export of strategic commodities; and the principal had previously been found by the Commission to have engaged in a scheme to permit himself to engage in ocean freight forwarding without a license. Id. (137).

A freight forwarder did not violate section 16 of the 1916 Act when it allegedly breached its duty to its principal by preparing shipping documents describing the goods in a manner contrary to the principal's express instructions, with the result that a higher rate was charged for the shipments. The principal, a shipper, was unable to show any competitive relationship with any other shipper. The forwarder was not under an "absolute obligation" to follow the instructions of its principal. What the shipper is alleging under the color of section 16 is a violation of an agent to its principal under common law principles. The Commission has no jurisdiction over such a claim. Further, were the Commission to espouse the sort of duty allegedly owed by the agent to its principal, complaince by a forwarder with such a duty could well result, in itself, in a violation of the Shipping Act. European Trade Specialists v. Prudential-Grace Lines, 148 (152–154).

A freight forwarder did not violate section 17 of the 1916 Act by its inability to secure

classification of its principal's cargo under a particular tariff item, thus "betraying the shipper" by misdescribing the cargo. The description furnished by the forwarder accurately described the commodity shipped and, accordingly, no unjust or unreasonable practice was engaged in by the forwarder. Id. (154).

A shipper did not sustain its burden of proof that a freight forwarder violated section 17 of the 1916 Act by failing to apprise its principal, the shipper, of any dispute or discrepancy as to the rate to be applied to the principal's goods. The record would not allow any conclusion on whether the forwarder had properly informed its shipper prior to shipment of a discrepancy in the applied rate. Id. (155).

Section 17 of the 1916 Shipping Act does not require that forwarders publish their regulations and procedures. Nor has the Commission, either in General Order 4 or elsewhere by rule or decision, mandated that a licensed freight forwarder must establish and publish a special body of regulations. Id. (156).

A freight forwarder did not violate section 17 of the 1916 Shipping Act when it failed to abide by its shipper's instructions in describing the commodity shipped. There was no evidence of collusion between the forwarder and the carrier. The forwarder properly described the cargo as it was required by the Act to do. The alleged "scienter" of the forwarder was irrelevant to a proceeding in which the issue was simply a determination of the nature of the commodity shipped. Id. (156–157).

The matter of whether a freight forwarder violated section 17 of the 1916 Shipping Act by allegedly not following the usual routine of a forwarder in informing its shipper that the carrier was objecting to a proposed tariff classification and in obtaining additional product classification from the shipper is remanded for further hearing with respect to the forwarder's obligations. Id. (157).

Carrier did not violate section 16 of the 1916 Shipping Act by discriminating in favor of Norfolk forwarders and against forwarders in ports and at airports. In this case the forwarder was selected by the shipper. As to alleged discrimination in favor of another shipper, there was no evidence that the carrier had ever carried cargo for that shipper. Id. (158).

Carrier did not engage in an unjust and unreasonable practice in violation of section 17 of the 1916 Shipping Act in that its agent did not inform the shipper of the agent's inability to bind the carrier to a rate initially quoted by the agent. The agent's representation was not conclusive as to the rate applicable and the shiper's president was thoroughly aware through experience of the inability of an agent to quote an authoritative rating since the conference and carriers were the final arbiters of the proper rate to be charged. Id. (160).

An application for an ocean freight forwarder license, which was commonly owned with a produce broker for a client engaged in the movement of produce in the export commerce of the United States, was independent from shippers within the meaning of section 1 of the 1916 Shipping Act, and its application would be granted. Sequoia Forwarders Co., 182 (186,190).

The *Zanelli* case does not stand for the proposition that every agency or other relationship between a forwarder and an export shipper is proscribed by the independence requirement of section 1 of the 1916 Shipping Act. The statutory requirement of "absolute independence" is "absolute" only to the extent that it "absolutely" bars the licensing of any applicant whose activities cause it to be included in one of the prohibited categories of section 1 of the Act. It is not a standard requiring an applicant to be "absolutely independent" of shipper interests. The section 1 independence requirement does not preclude all relationships between forwarders on the one hand, and shippers and consignees on the other. Id. (187–188).

A produce broker for a client engaged in the movement of produce in the export commerce of the United States was neither a "shipper," "consignee," "seller" or "purchaser of export shipments within the meaning of section 1 of the 1916 Shipping Act. Id. (188).

There was no reason to believe that an arrangement between a produce broker commonly owned with an applicant for freight forwarder license and a client providing 25% of the broker's business was such that the client "directly or indirectly controlled" the broker within the meaning of section 1 of the 1916 Shipping Act. Neither firm had any employees in common, nor did they own stock, have a proprietary interest in or a corporate connection with one another. Such a relationship is not the type of relationship which the Commission has in the past found to allow for the granting of illegal rebates, and therefore prohibited by section 1 of the Act. Id. (188–189).

That an applicant for an independent ocean freight forwarder license might possibly use confidential information obtained as a forwarder for the benefit of a commonly owned commodity broker and its principal client was not grounds for denying its application. What an applicant might do, if licensed, is insufficient to justify the denial of a license if the applicant is otherwise qualified in fact and law. Once licensed, however, the forwarder is subject to all Commission rules and regulations, and any unlawful conduct or activity can be dealt with in an appropriate proceeding. Id. (189).

The purpose of section 510.24(c) of the Commission's rules is to prevent illegal rebates by prohibiting a licensed forwarder from sharing any part of its revenue with a shipper or agent thereof, since were it to do so the shipper would be in fact receiving a rebate. Thus, while a commodities broker which was commonly owned with an applicant for an independent ocean freight forwarder license, was the special agent for a client involved in the movement of produce in the export commerce of the United States, and was registered as such under the Agricultural Commodities Act, it did not necessarily follow that this type of special agency was of the nature so as to invoke the prohibition of section 510.24(c). That section is directed at agency arrangements which give rise to direct or indirect rebates to the shipper, i.e., where the agent is controlled by the shipper or consignee principal. Id. (190).

Assuming, arguendo, that an applicant for a freight forwarder license had an officer qualified to conduct ocean freight forwarding, there remains the matter of another officer submitting false information to the Commission and its representative with the presumed knowledge of yet another officer (who together hold most of the applicant's stock). This activity alone calls into question the applicant's "fitness" to conduct a freight forwarder business. International Freight Services, Ltd., 224 (225).

A freight forwarder license is somewhat more than a mere license to do business. The holder of a license occupies a position of enormous competitive and economic power and enjoys a fiduciary relationship with shippers. A licensee's integrity must be above repraoch. The giving of false information to the Commission or its representative is to be considered in determining the fitness of an applicant. Id. (232).

Questions of "legal fraud" have no place in determining whether an applicant for a freight forwarder license has been truthful in his representations to the Commission about his qualifications for a license. Ability to serve the public in an endeavor as sensitive as forwarding should not turn on nice legal distinctions. Id. (236–237).

Applicant for a freight forwarder license who made numerous misrepresentations to the Commission or its representative must be denied a license. To do otherwise would be to condone a cavalier approach to misrepresentation made by the applicant himself; to overlook the fact that he induced others to falsely represent themselves; to finally accept those proven facts as "peccadillos" which should be overlooked for the sake of

permitting the applicant to "provide expanded service to the shipping public"; and to accept applicant's concept of "normal competition" practices which were found to be unlawful in open court. The applicant is unfit to carry on the business of forwarding. Id. (240–241).

Applicant for a freight forwarder license, one of whose two principals had no actual experience in forwarding while the other's experience was limited to one shipment which he personally handled, was not able to conduct the business of an ocean freight forwarder. The principal who handled one shipment claimed that he was qualified on the basis of being in charge of the London office of a company when it handled some ocean shipments and on the basis of his experience in handling air shipments. There was no evidence as to the alleged similarity of air and ocean shipments. Having observed the demeanor of the principal on the witness stand and having considered the whole of his testimony and the entire record in the case, it cannot be concluded that the experience of the principal renders him sufficiently "able" to conduct the freight forwarding business so as to be the qualifying officer for the corporate applicant. Id. (24–243).

GENERAL ORDER 4: See Freight Forwarding

GENERAL ORDER 5: See Accounting Reports

GENERAL ORDER 11: See Accounting Reports

GENERAL ORDER 13: See Rates

GENERAL ORDER 20: See Security for the Protection of the Public

GENERAL ORDER 29

Two proceedings (investigating the lawfulness of certain rates bid by a carrier for the carriage of military cargo) which had been continued beyond the life of the rates challenged therein for the purpose of establishing prospective guidelines regarding the application of General Order 29 of the Commission were discontinued without prejudice due to the amount of time that had elapsed since the institution of the proceedings and in view of the imminent introduction of a new standardized cost information system, which would necessitate further revision of the General Order when implemented. American Export Lines, Inc., Sea-Land Service, Inc. and United States Lines, Inc.—Possible Violations of Section 18(b)(5) of the Shipping Act, 1916, in connection with Rates on Military Cargo, 391 (392).

JURISDICTION

The jurisdictional problem of the failure of a complaint to establish that complainant has paid the freight, or has otherwise validly succeeded to the claim, goes to the issue of standing to recover reparation, although not to standing to file a complaint not seeking reparation. Trane Co. v. South African Marine Corp. (N.Y.), 374 (378).

A complaint, seeking reparation for overcharges, which failed to allege that a common carrier by water subject to the jurisdiction of the Shipping Act violated section 18(b)(3) of the Act is jurisdictionally defective and must be dismissed. Id. (381).

A complaint alleging a violation of section 18(b)(3) of the Shipping Act by a common carrier, but naming only the carrier's agent as respondent, is jurisdictionally defective.

Section 18(b)(3) is limited by its terms to common carriers or conferences of such carriers. A carrier's agent does not transport property, is not a party to a conference agreement consisting of carriers, and has no tariff of its own, there is no doctrine that a carrier may stand aloof while the agent assumes full responsibility for violation of the carrier's duties under the Act. Id. (382–383).

Section 33 of the Shipping Act does not preclude the Federal Maritime exercise of jurisdiction over a company engaged in the transportation of passengers for hire between various points on the Atlantic Coast of the United States pursuant to P. L. 89–777. Not only was P.L. 89–777 not enacted as part of the Shipping Act, but section 33 only precludes concurrent (with the ICC) subject matter jurisdiction. While the carrier here is subject to Part III of the Interstate Commerce Act, none of its provisions are even similar to provisions of section 3 of P.L. 89–777. American Cruise Lines, Inc., 420 (422).

Part III of the Interstate Commerce Act does not contain a provision requiring parties subject to that Part to establish financial responsibility for passenger indemnification as required by P.L. 89–777. Accordingly, the FMC in exercising jurisdiction over an interstate common carrier, subject to ICC jurisdiction, under P.L. 89–777 is not exercising concurrent jurisdiction with the ICC. Not only does the ICA not prohibit carriers subject to it from complying with the rules and regulations of other agencies, but it specifically provides in Part III thereof that "nothing in this chapter shall be construed to affect . . . liabilities of vessels and their owners for loss or damage. . . ." Id. (422–423).

The 1916 Shipping Act limited the Commission's *in personam* jurisdiction in only three respects: (1) there must be a common carrier by water which is not a tramp or ferryboat; (2) the carrier must transport cargo between the United States and a foreign country; and (3) the Commission may not exercise concurrent jurisdiction over any matter within the jurisdiction of the ICC. The FMC's foreign commerce jurisdiction is not restricted to ocean carriers operating vessels which physically call at United States ports. A common carrier engaged in through transportation of goods between the United States and a foreign country by water is subject to section 1 of the 1916 Act. Austasia Container Express, 512 (518).

The 1916 Shipping Act does not permit the Commission to directly reach the port-to-port rate of an ocean carrier operating only between two foreign countries. Nor does the Commission envision section 1 of the Act as encompassing joint rate/through route international transportation offered by ICC regulated carriers via foreign ports in conjunction with ocean carriers which are themselves subject to the Shipping Act. Id. (518).

American goods exported to Canada on one bill of lading may be shipped elsewhere under a second bill of lading without directly involving the Commission's jurisdiction. However, extraterritorial aspects of section 15 agreements or other anticompetitive actions by section 1 carriers violative of sections 16 or 17 may be within the scope of the Shipping Act. Id. (518).

Nonvessel operating carriers are section I carriers. They undertake to provide ocean transportation to the public and are subject to the same tariff filing requirements as vessel operating carriers. Id. (518–519).

Carrier which holds itself out as offering a through common carrier service from Detroit to various Australian ports (truck to Windsor, Ontario, rail to Vancouver, Canada, vessels to Australia) and which issues a single bill of lading for the entire movement when the cargo reaches Canada, is a nonvessel operating common carrier in the foreign commerce of the United States within the meaning of section I of the 1916 Shipping Act. To accord jurisdictional significance to the fact that the bill of lading is

not issued until the goods reach Canada, and that the underlying water carrier does not call at a United States port, would exalt form over substance. It would leave a significant loophole in the Shipping Act's protective mantle. Id. (513, 518–519).

So long as a nonvessel operating carrier solicits and musters cargo in the United States and uses exempt ICC motor carriage to transport the cargo from the United States on a through route containing a significant transoceanic segment (Detroit to Windsor, Ont., to Vancouver, B.C. to Australia), the carrier can and should be effectively regulated by the Maritime Commission. The ICC's limited regulation of carriage to Windsor is not an obstacle to exercise of FMC jurisdiction. The joint exercise of ICC and FMC authority over a particular person does not constitute the type of concurrent power forbidden by section 33 of the 1916 Shipping Act; that prohibition only prevents the two agencies from regulating the same commercial activities at the same time. Id. (520).

The true purpose of the Commission's previous descriptions of its jurisdiction as "port-to-port" was to disclaim any encroachment into the legitimate regulatory realm of the ICC at a time before the FMC and ICC had developed mutual procedures for the filing of joint through intermodal tariffs. Id. (520).

Nonvessel operating carrier which offers through transportation of goods from Detroit to Australia, via truck to Windsor, Ont., rail to Vancouver and vessels to Australia, is required by section 18(b) of the 1916 Shipping Act to file a tariff covering the through route transportation. Moreover, the Commission's rules requiring filing tariffs is not jurisdictionally limited by section 18(b). Since 1961, the Commission's rule making authority has resided in Shipping Act section 43. This authority has been broadly interpreted by the courts and permits the adoption of substantive rules in furtherance of general Shipping Act objectives without a prior finding that a specific Shipping Act violation has occurred. The Commission's obligations to define and eliminate unreasonable preference and discrimination by ocean carriers pursuant to sections 16 First and 17 of the Act are sufficient to support adoption of the tariff filing rules and their application to all foreign commerce carriers as defined in section 1 of the Act. Id. (521–522).

OVERCHARGES: See Reparation

PRACTICE AND PROCEDURE

— In general

A finding made by a Settlement Officer which was not reviewed by the Commission was of a procedural value and was dispositive of a similar issue in a subsequent case. Vandor Imports v. Orient Overseas Container Lines, 396 (398–399).

Where the complaint in a proceeding for reparation was served by mail upon respondent on October 29, 1975, accompanied by a Commission cover letter stating that complainant had requested the shortened procedure provided in Rule 11 of the Commission's Rules of Practice and Procedure but referring by error to the "informal procedure" under which an answer should be filed; respondent filed an affidavit, received by the Commission on November 20, 1975, consenting to the informal procedure under Subpart S of the Rules (applicable only to proceedings involving claims of less than $5,000), whereupon respondent received a letter from the presiding officer stating that the informal procedure was not applicable and that complainant had requested the shortened procedure, and urging respondent to enter an appearance in the proceeding, the presiding officer's letter constituted a grant of an extension of time for

respondent to state whether it consented to the shortened procedure and to answer the complaint. The granting of such an extension was authorized by Rule 10(g) of the Commission's Rules. E.S.B. Inc. v. Moore-McCormack Lines, Inc., 480 (481).

Where the presiding officer in a proceeding for reparation granted (pursuant to Rule 10(g) of the Commission's Rules of Practice and Procedure) an extension of time for respondent to state whether it consented to the use of the shortened procedure and did file an answer, permission from the Commission or the Chief Administrative Law Judge to grant the extension pursuant to Rule 5(d) was unnecessary. Rule 11(i) provides that Subpart E (Rule 5) applies only where the respondent does not consent to conducting the proceeding under the shortened procedure, Rule 5 was inapplicable. Id. (481).

The presiding officer in a proceeding for reparation properly denied complainant's motion for judgment on the pleadings, which was based on the respondent's failure to answer the complaint within the twenty-day period provided by Rule 5(d) of the Commission's Rules of Practice and Procedure. Even where agencies act in a quasi-judicial capacity, the strict rules which prevail in suits between private parties and the hard and fast rules as to pleadings which govern courts of law do not apply to administrative proceedings, where inquiries should not be too narrowly constrained by technicalities. Respondent was unaware of the Commission's procedural requirements, but, when instructed how to proceed, made what appeared to be a good faith effort to comply with the Commission's Rules. Moreover, the complaint, alleging a violation by the respondent of section 18(b)(3) of the Shipping Act, 1916, raised issues of fact which could not be resolved by default, but were required to be properly established on the basis of all the available evidence. Under the circumstances, the presiding officer had the authority to grant respondent an extension of time in which to answer, and did not act arbitrarily in accepting the filing of respondent's answer. Id. (481).

The Commission amends its Rules of Practice and Procedure to authorize presiding officers to enter such order or rule as they deem proper when no answer to a complaint is timely filed and to extend the time for filing answers; to permit the filing on the following business day when the two-year statutory limit for filing complaints seeking reparation expires on a Saturday, Sunday, or legal holiday; and to authorize presiding officers to order a hearing as well as the submission of additional evidence in proceedings conducted under the shortened procedure. Rules of Practice and Procedure, 656.

Where an administrative law judge dismissed the proceeding, observing that complainant had filed no replies to respondents' motions to dismiss, and, upon being informed by complainant that he had not received copies of the reply due to clerical error, entered an "Order upon Sua Sponte Reconsideration" wherein he took account of complainant's replies and again dismissed the proceeding, the sua sponte reconsideration order constituted an adequate response to complainant's subsequently filed motion for reconsideration, in which complainant raised the same arguments. The administrative law judge was accordingly not required to address the latter motion separately. Interconex, Inc. v. Sea-Land Service, Inc., American Export Lines, Inc., and U.S. Lines, Inc., 714 (715).

Complainant in docket proceeding is dismissed without prejudice. The case was almost four years old and there were no signs whatsoever that complainant would proceed to hearing. The practices complained of had long since been terminated, and whatever issues which have remained were removed by complainant when it amended the complaint to delete its claim for reparation. The case was therefore essentially academic and at best would lead to a declaratory order-type decision establishing the rights of the parties. However, the dismissal would not be with prejudice and the ALJ

would not make findings on the merits. Complainant had succeeded in dismissing the claim for reparation with prejudice by its amendment since that claim was now barred by the statute of limitations. Dismissal of the remainder of the complaint with prejudice was not warranted since complainant had not been guilty of contumacious conduct and had not been in willful default. As to the request that the record be made a part of any future proceeding between the parties relating to the same controversy, claims for reparation were now time-barred, and, in view of the fact that complainant was now seeking damages in an antitrust suit, it appeared unlikely that complainant would resume litigation before the Commission with no prospect of recovering damages. Moreover, no evidentiary record existed in the case, merely proffered documents and other materials which had not been admitted into evidence. Consolidated Express, Inc. v. Sea-Land Service, Inc., 722 (723–725).

— Attorneys

The Commission expects attorneys and other persons practicing before it to observe the same code of conduct and standard of diligence as would be required of them in a court of law. The Commission quasi-judicial character must be recognized and respected not solely for its own sake but more importantly to assure that the basic procedural and substantive rights of party-litigants be properly protected and represented. Windjammer Cruises, Inc. and Windjammer Cruises, Ltd., 112 (113).

The Commission's Rules of Practice limit practice before the Commission to attorneys, persons admitted to practice, or officers or regular employees of a party to a proceeding; practice before the Commission by firms or corporations on behalf of others is specifically prohibited. Accordingly, where a claim was submitted by one firm on behalf of another, and there was nothing in the Commission's files to indicate that the person filing the claim was an attorney or a person admitted to practice before the agency, the complaint was not properly submitted under the Rules of Practice and could not be considered on its merits. The complaint was dismissed without prejudice to resubmission within the two year statutory time period for the filing of such claims. Wilmot Engineering Co. v. United States Lines, Inc., 403.

— Declaratory orders

A petition for declaratory order seeking authority to capitalize the cost of monies used to acquire a containership under construction (which cost would include the net interest paid on borrowed funds, or "actual interest," and income foregone as a result of using existent company funds, or "foregone interest"), and further requesting the Commission to state that such capitalized interest would be recognized as part of the petitioner's vessel investment account in all rate making proceedings involving the new vessel and future vessels constructed by the petitioners, presented involved questions of policy and fact not effectively treatable by issuance of a declaratory order, and was therefore denied. Petitioner did not request the resolution of a particular controversy or uncertainty arising from prior actions of the Commission, or even allege that any controversy existed, but desired a personal exemption from the Commission's ordinary approach to rate base valuation; before a conclusion could be reached on such a "petition for special relief," close examination of the petitioner's financial position and rate structure would be required, an action for which there did not appear to be any current public interest basis. Petition for Declaratory Order of Matson Navigation Co., 462 (463).

— Designation of parties to agreements

Rules of Practice and Procedure are amended by designating parties to agreements as "proponents" and parties opposing approval as "protestants." General Order 16, Amdt. 16, 509.

— Dismissal orders

Rules of Practice and Procedure are amended to provide specifically for review of orders of dismissal by presiding officers. General Order 16, Amdt. 16, 509 (511).

— Government in the Sunshine Act

The Commission adopts regulations to implement the Government in the Sunshine Act. Commission meetings will be announced by appropriate methods in addition to publication in the Federal Register. Notices will be provided in the public reference room. Public Information, 559.

The Commission amends its Rules of Practice and Procedure relating to ex parte communications in order to conform them to the requirements of section 14 of the Government in the Sunshine Act. The rules do not authorize Hearing Counsel to engage in forbidden ex parte practices. Ex Parte Communications, 601 (602).

— Production of witnesses and materials

Rules of Practice and Procedure are amended to provide that presiding officers will rule on the production of witnesses and materials located in a foreign country. Only the Commission shall enforce orders and enforcement is discretionary. General Order 16, Amdt. 16, 509 (510).

PRACTICES: See also Terminal Operators

A freight forwarder did not violate section 17 of the 1916 Act by its inability to secure classification of its principal's cargo under a particular tariff item, thus "betraying the shipper" by misdescribing the cargo. The description furnished by the forwarder accurately described the commodity shipped and, accordingly, no unjust or unreasonable practice was engaged in by the forwarder. European Trade Specialists, Inc. v. Prudential-Grace Lines, Inc., 148 (154).

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The matter of whether a freight forwarder violated section 17 of the 1916 Shipping Act by allegedly not following the usual routine of a forwarder in informing its shipper that the carrier was objecting to a proposed tariff classification and in obtaining additional product classification from the shipper is remanded for further hearing with respect to the forwarder's obligations. Id. (157).

Carrier did not engage in an unjust and unreasonable practice in violation of section 17 of the 1916 Shipping Act in that its agent did not inform the shipper of the agent's inability to bind the carrier to a rate initially quoted by the agent. The agent's representation was not conclusive as to the rate applicable and the shipper's president was thoroughly aware through experience of the inability of an agent to quote an authoritative rating since the conference and carriers were the final arbiters of the proper rate to be charged. Id. (160).

Allowance by the West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference and its member lines of a three percent discount on prepaid freight does not violate sections 16 and 17 of the 1916 Shipping Act. The determinative factor is whether the conference can justify added expenses for handling collect shipments. Here, the average difference in time between the receipt of freight prepaid and the receipt of freight collect is about 30 days and this delay results in additional cost to the carrier, a major part of which is attributable to the necessary increase in working capital caused by the delay. The impact of the delay is exacerbated by the condition of the Italian economy—high interest rates and inflation. West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference Amended Tariff Rule Establishing an Allowance on Prepaid Freight, 751 (755).

PREFERENCE AND PREJUDICE: See also Freight Forwarding

Terminal lease agreement between the City of Anchorage and Sea-Land Service, Inc., providing for a shift of Sea-Land's preferential berth from Terminal 1 to Terminal 2 on February 1, 1976, will not be temporarily approved. Severe icing occurs at Anchorage, and there is the real possibility that Totem's vessel could be damaged because of the mooring and weather conditions. Totem will not berth at Terminals 2 and 3 during the severe icing conditions because of the risk to the vessel and her crew. If Totem cannot use POL-Terminal 1, even on a first-come-first-served basis, it may be forced to leave the trade, at least temporarily. Totem's refusal to use Terminals 2 and 3 is reasonable. Continuation of Totem's service to Anchorage is in the public interest and should be maintained if possible. Continued use of Terminal 1 by Sea-Land in a preferential basis is contrary to the public interest in violation of section 15 of the 1916 Act, in that there is a real possibility that it will serve to effectively preclude Totem from offering a competitive service during severe icing conditions. Therefore, the presently approved agreement between the City and Sea-Land which gives Sea-Land preferential berthing rights at Terminal 1 will be disapproved effective February 5, 1976, unless the parties, prior to that date, amend the agreement to provide that effective February 5, 1976, such preferential berthing rights shall not apply during the months of February through April 1976. Agreement Nos. T–1685, as Amended and T–1685–6: Between the City of Anchorage and Sea-Land Service, Inc., 69 (79–80).

Not all preferences or advantages offered by carriers are condemned by law, but only those that are unjust or unreasonable violate the Shipping Act, 1916. Moreover, the existence of unjust discrimination or prejudice must be demonstrated by substantial proof. Port of Houston Authority v. Lykes Bros. Steamship Co., Inc., 192 (199).

Complaint of the Military Sealift Command that a carrier had violated section 18(a) of the 1916 Shipping Act because it had failed to file "appropriate military class rates" is

dismissed. Complainant failed to establish that the carrier's rate structure was unreasonable vis-a-vis other shippers. Similarly, complainant's request that container rates for military cargo be established at a level that would provide the carrier "a return equivalent to the fully allocated costs of transporting those classes of cargo plus an appropriate return on its investment in the trade" would, to the extent that such a standard is not applied to commercial shipments, place complainant in a preferred class. This would establish a special class of rates applicable only to military cargoes and, without additional jurisdiction, would clearly be contrary to the intent of Congress in repealing section 6 of the Intercoastal Shipping Act of 1933. Department of Defense and Military Sealift Command v. Matson Navigation Co., 503 (507).

Practices of the Port of Houston Authority, in connection with the rental of heavy crane equipment, under which Houston's cranes have first priority on jobs, even to the extent of displacing private crane owners equipment already working, violate sections 16 First and 17 of the 1916 Shipping Act, not only as applied against private crane operators, but also with regard to stevedores hiring private cranes. Houston has unjustly preferred itself to private crane owners and subjected stevedores hiring private crane owners to "bumping" and other unreasonable practices while exempting stevedores who own their own cranes from such practices. Perry's Crane Service, Inc. v. Port of Houston Authority of Harris County, Texas 548 (549).

The Port of Houston's practice of giving itself first priority on cranes must be limited. Prior to the start of any job a stevedore should determine the availability of Houston's cranes and if there is one equally suitable for the job at hand then Houston should be given a preference as to furnishing a crane for that job. The limited preference is justified because of Houston's heavy investment in cranes and extensive labor-related expenses and guarantees; declining share of available crane work; the flexibility of private cranes in moving from one location to another—an option not open to Houston; the fact that private crane owners are using facilities constructed and paid for by Houston to conduct their private business; and the absence of any evidence that Houston is attempting to monopolize the crane rental business on its facilities. Limiting of the preference results in a practice which, while still preferential, is no longer undue or unreasonable—the key determination. The first call privilege, as modified, will require stevedores to select a Houston crane only if that crane is suitable for the job in the judgment of the stevedore in terms of size and expense as any available crane. Id. (551–552).

Practice of the Port of Houston, in connection with the rental of heavy crane equipment, of preferring its own cranes to the extent of "bumping" other crane equipment is unlawful and cannot be justified even if modified to allow Houston "bumping" privileges if it can furnish a more suitable crane for the job than that provided by the private crane owner. Assuming the unavailability of a Houston crane and the election by a stevedore to use a private crane for a particular job, that private crane owner should be permitted to perform the job to completion without "bumping" by a Houston crane. Id. (552).

Contention that the failure of the Far East Conference and its member lines to take action against the member lines engaging in minibridge activities, even if consistent with the conference agreement, still results in unjust prejudice to complainant, a member line which cannot engage in the particular minibridge activities involved, is rejected. The argument ignores the fact that overland competition from the Pacific Westbound Conference lines, the majority of which are also FEC members, has existed for over 50 years. Lykes Bros. Steamship Co., Inc. v. Far East Conference, 589 (593–594).

The contention that the costs of freight forwarders in processing GSA accounts can be

absorbed without additional personnel and without incurring significant costs, and, that therefore costs charged to the GSA for processing shipments should not be compared to costs charged to commercial shippers, is rejected. The fatal flaw in such an approach is that it is not applied to commercial accounts. Respondents' failure to even consider the application of the "absorption" theory to their commercial accounts or to provide any explanation as to why incremental pricing is appropriate for GSA accounts but not for commercial accounts renders that approach unjustly and unlawfully discriminatory as between shipper customers. Freight Forwarder Bids on Government Shipments at United States Ports—Possible Violations of the Shipping Act, 1916, and General Order 4, 619 (624–625).

The prohibition against uneven treatment embodied under section 16 First of the 1916 Shipping Act extends not only to "persons" but also to a "description of traffic." Thus, in a proceeding to determine whether practices of freight forwarders as they related to contracts with the GSA violated section 16 of the 1916 Shipping Act, the Commission could consider those issues even if the GSA were not a person within the meaning of section 16 since GSA shipments describe a particular kind of traffic. Id. (622).

In order to find that freight forwarders had violated section 16 First of the 1916 Shipping Act by offering reduced rates to the GSA, it was not necessary to find that the GSA actually competes with commercial shippers. While a forwarder may not have to perform all services listed in a GSA contract, the fact remains that a forwarder is contractually obligated to perform any and all of those services upon request, and those services generally correspond to those offered a commercial shipper. The work involved in processing a GSA shipment is clearly no less complex or time consuming than with a commercial account, and it follows that the costs involved in processing GSA and commercial shipments should be comparable. Id. (623–624).

The contention that that the provision of freight forwarding service to the GSA at lower rates than to commercial shippers is in the public interest because the government receives quality service at low cost without injuring anyone is without merit. By enacting section 16 of the 1916 Shipping Act, among other provisions, Congress has established the "public policy" to be the fair and even handed treatment of similarly situated shippers and localities. To the extent that low forwarding fees do not reflect the cost of providing such services, they have arguably made commercial customers pay costs attributable to GSA shipments. If a commercial shipper is called upon to subsidize any costs of processing GSA shipments it follows that that shipper has been financially injured to some degree. Even if it could somehow be shown that the low bids assessed GSA did not result in measurable financial losses, freight forwarders could not be absolved from wrongdoing. The potential for injury is clear and exists with or without finding of specific economic damage. The extent of injury is only critical in a reparation context. Id. (625–626).

Requiring freight forwarders to establish reasonable and equitable charges for the handling of GSA shipments would not run contrary to the public interest by substantially restraining competition in the forwarder industry. Such a requirement would merely ensure that forwarders honor an obligation imposed on them by law, that once a particular forwarding fee is established by a forwarder for a particular service based on the circumstances of his operation, that fee be made available to all shippers equally. Even if such a requirement might lessen competition, such action is dictated by the requirements of the 1916 Shipping Act. Id. (626).

Freight forwarders who charged the GSA less for freight forwarding service than commercial shippers violated section 16 First of the 1916 Shipping Act. Id. (627)

Freight forwarders who charged the GSA less for friehgt forwarding services than

commercial shippers in violation of section 16 First of the 1916 Shipping Act also violated section 510.24(b) of Commission General Order 4. The variation in the magnitude of the fees charged the GSA and commercial shippers was sufficient to give rise the reasonable probability that the low bids offered by the forwarders were in consideration of those forwarders receiving compensation from carriers in violation of section 510.24(b). Id. (628–629).

Because section 510.24(b) of Commission General Order 4 makes it unlawful for a licensee to "render or offer to render" any forwarding service free of charge or at a reduced fee, a licensee who only offered to render, but never actually rendered, such service free or at a reduced charge would still run afoul of that section. Id. (629).

There is nothing in the 1916 Shipping Act or its legislative history to support the conclusion that government agencies are to be given preferred treatment on forwarding services. If a government shipper, here the GSA, must pay the same terminal and ocean transportation charges as do commercial shippers, there is no reason why the GSA should acquire a preferred position with regard to forwarding services. Any amendment to section 510.24(b) of Commission General Order 4 which would place GSA shipments in the same category as charitable and relief agencies would in effect permit forwarders of GSA shipments to rely on brokerage from ocean carriers to cover the cost of processing such shipments. Such an amendment would clearly be inconsistent with the intent of Congress. Id. (630).

Freight forwarders issuing bids to the GSA will be required to determine and establish, based on the costs and the circumstances of their operations, the fee that will be assessed the GSA for processing its shipments. Whatever GSA fee is established shall be compensatory, equitable and nondiscriminatory vis-a-vis commercial accounts. Id. (631–632).

Allowance by the West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference and its member lines of a three percent discount on prepaid freight does not violate sections 16 and 17 of the 1916 Shipping Act. The determinative factor is whether the conference can justify added expenses for handling collect shipments. Here, the average difference in time between the receipt of freight prepaid and the receipt of freight collect is about 30 days and this delay results in additional cost to the carrier, a major part of which is attributable to the necessary increase in working capital caused by the delay. The impact of the delay is exacerbated by the condition of the Italian economy—high interest rates and inflation. West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference Amended Tariff Rule Establishing an Allowance on Prepaid Freight, 751 (755).

The mere fact that military household goods are transported at one rate when shipped directly by the Military Sealift Command and at another rate when a nonvessel operating common carrier intermediary is employed does not establish a violation of section 17, first paragraph of the 1916 Shipping Act. The Commission has not been presented with a clear case of two shippers of like traffic moving under the same circumstances and conditions being charged different rates—to the detriment of one of them. Nothing on the record indicates that "MSC Cargo, N.O.S." and "Household Goods of Government Personnel Shipped by NVO's Under Government Bills of Lading" are not different commodities for rate making purposes. Although both include military household goods, each description legitimately includes other items as well. While two shippers are technically involved, the special circumstances of the case indicate that the NOV's are not operating independently, but as the *alter ego* of the Defense Department. The real party in interest is not injured by the different rates these "shippers" pay within the meaning of section 17. Household Goods Forwarders Association of America v. American Export Lines, 787 (790–792).

RATES: See also Agreements Under Section 15; Discrimination

Nonvessel operating common carrier which charged higher rates than specified in its tariff violated section 18(a) of the 1916 Act and section 2 of the Intercoastal Shipping Act, and its tariff is canceled. Possible Violations of Section 18(a) of the Shipping Act, 1916, and Section 2 of the Intercoastal Shipping Act Arising from Charging Higher Rates than Specified by Tariff, 43 (49, 56–57).

There is no requirement under the Shipping Act that obligates a carrier to acquiesce to a particular description of cargo desired by the shipper, particularly when the description desired appears to be inaccurate. The carrier's obligation in general is to rate the goods accurately according to the descriptions available to it. European Trade Specialists, Inc. v. Prudential-Grace Lines, Inc., 148 (161).

The standard for whether or not a cargo is properly rated is only a determination of what the goods transported actually were. There is no "unreasonable man" standard as applied to torts at common law. The administrative law judge was completely justified in relying on the shipper's own sales literature and samples of the commodity itself in attempting to determine the true nature of the goods. The next question should involve the propriety of the rates applied to these goods. In this case, the record is inadequate and the proceeding is remanded to resolve the exact nature of the goods shipped and the properly applicable rate. Id. (163–164).

Section 18(b) of the Shipping Act, 1916, requires that carrier/conferences in foreign commerce file with the Commission rates and charges "for transportation between all points on its route and on any through route which has been established." Thus, the requirement clearly applies not only to point-to-point traffic, but to through routes as well. Therefore, and until exempted pursuant to section 35 of the Act, the law requires the filing of through rates with the Commission notwithstanding that such rates are also on file with another agency. Filing of Freight and Passenger Rates, Etc., 203 (205).

Nonvessel operating common carriers by water engaged in providing transportation for military household goods and personal effects where there is also a domestic movement within the United States are granted continuing special permission to file supplements and/or revised tariff pages for such transportation on less than the 30 days' notice requirements of sections 18(a) and (b) of the Shipping Act, 1916, but not less than one days' notice, and a waiver of the tariff format requirements of Tariff Circular No. 3 and General Order 13 is granted. Id. (205–206).

Reasonable rates are determined by establishing a fair value of the carrier's property devoted to public service. This return on rate base should be sufficient to cover operating expenses and the cost of attracting capital. Petition for Declaratory Order of Matson Navigation Co., 462 (464).

Carrier's general rate increase in the Virgin Islands trade is found to be just and reasonable. Respondent has experienced increased costs of operation and respondent operates efficiently. Some indication of the need for the increases was shown, and no computation made with respect to the increases showed them to be improper. The rates withstand the test of operating ratio and rate of return on rate base. Transconex, Inc.—Proposed General Rate Increase in the Virgin Islands Domestic Offshore Trade, 492 (495).

While a bill of lading description of a commodity is ordinarily neither conclusive nor binding in a determination of legal freight charges, where the consignor or shipper is the manufacturer of the commodity shipped, the description in the bill of lading may not be ignored. CSC International, Inc. v. Waterman Steamship Corp., 523 (527).

There is no better entrenched rule in the making of rates and ratings than the one that

a commodity cannot be lawfully classified according to the uses to which it is put. Id. (528).

One use of a commodity does not necessarily determine the transportation nature for tariff purposes of the commodity. Different rates on the same commodity dependent upon the use made of the commodity would lead to unjust discrimination. Id. (528).

The nature and character of each shipment at the time tendered determines its status for rate purposes, and the use which may subsequently be made of the material shipped is not controlling. Id. (528).

Complaint alleging carrier misrated a commodity as a chemical instead of as a detergent, and therefore applied an improper rate, is dismissed. Complainant was a manufacturer and distributor of chemicals; the bill of lading described the commodity as a chemical; the consignee was a chemical company; the commodity is defined in a chemical dictionary; and, one of the uses of the commodity is in chemical synthesis. Moreover, the classification of the commodity as a chemical was clearly in conformity with the classification of the commodity contained in the Statistical Classification of Domestic and Foreign Commodities Exported from the United States published by the Department of Commerce. Id. (528).

There is no conflict between the requirements imposed by the Federal Property Act and the 1916 Shipping Act. The GSA's authority to obtain transportation at the "lowest overall cost" does not overrule the requirement that the rate agreed upon for such transportation be lawful under the 1916 Shipping Act. This is particularly so since the 1916 Shipping Act contains no exemption of the type appearing in section 22 of the Interstate Commerce Act granting the government preferred status. Rates and charges assessed the government must therefore be reasonable and nondiscriminatory and otherwise comply fully with the substantive provisions of the 1916 Shipping Act. Freights Forwarder Bids on Government Shipments at United States Port—Possible Violations of the Shipping Act, 1916, and General Order 4, 619 (632).

On reconsideration and giving due regard to the fact that carriers not previously participating in the proceeding represent a substantial portion of the entire capability in the very trades, i.e., domestic offshore, the Commission's final rules were intended to address, the promulgated rules (revoking rules requiring the maintenance of records and submission of data with regard to rate base) are withdrawn. Reports of Rate Base and Income Account, 745 (746).

REPARATION

—In general

The proviso portions of section 18(b)(3) of the 1916 Shipping Act, which empower the Commission to permit a refund or waive collection of a portion of freight charges, are not of a discretionary procedural nature. In order for the Commission to be vested with the authority to grant refunds or waivers it must first ascertain that all requirements set forth in section 18(b)(3) of the Act have been complied with. Commodity Credit Corporation v. Surinam Navigation Co., Ltd., 65.

Application to waive collection of a portion of freight charges is denied where complainant merely submitted the conclusory statement that there had been a "misfiling due to clerical error," and supporting documents submitted by complainant did not reveal the nature of the alleged clerical error. A determination as to the propriety of a waiver could not be made on such a record. The Commission may not permit deviations from the rates on file. Union Engineering, Kuwait v. Iran Express Lines, 93 (96–97).

Reparation is awarded to a shipper whose shipment was incorrectly rated by the carrier. The shipment consisted of fiber drums of polyethylene synthetic resin, there was a specific tariff in force for such material, and the carrier had applied the higher synthetic resin N.O.S. rate for the material. The carrier had specific knowledge from the bill of lading that the material was shipped in drums. Union Carbide InterAmerica, Inc. v. Venezuelan Line (Compania Anonima Venezolana de Navegacion), 97 (99).

Reparation is awarded where the carrier had failed to charge complainant's subsidiary the contract rate although the shipper had not been listed as the fully-owned subsidiary of complainant and the bills of lading failed to contain the appropriate proprietary clauses. The contract shipper later notified the carrier of the subsidiary status of the shipper and that the cargo was proprietary cargo. Cities Service International, Inc. v. Lykes Bros. Steamship Co., Inc., 128 (129).

With respect to domestic intercoastal commerce governed by section 18(a) of the 1916 Shipping Act and section 4 of the Intercoastal Shipping Act of 1933, an error in a tariff is not, standing alone, and in the absence of a finding of unreasonableness, ground for permitting a carrier to charge rates other than those on file and in effect at the time of the shipment. Accordingly, a carrier was denied permission to refund a portion and to waive collection of a portion of the freight charges on three shipments of sterilized milk in hermetically sealed containers from Oakland, California, to Guam, where the carrier was not able to prove that the rate charged was unreasonable but only that the rate for milk, "sterilized, in hermetically sealed containers with or without added flavoring" had mistakenly been changed to "W/M" from "W/T" with the result that the charges in question had incorrectly been on a measurement rather than a weight basis. Real Fresh, Inc. v. Matson Navigation Co., 215 (216–217).

In denying a claim for a refund under a tariff rule providing that the carrier bears the cost of transporting the cargo from the actual port of discharge to the port of discharge named in the bill of lading on the grounds that the shipper had failed to provide adequate proof of the port of discharge named in the bill of lading, the settlement officer erred by failing to request the shipper or the carrier to supply additional documentation pursuant to 46 CFR 502.304(a) and (e). F. Powers Co., Inc. v. Orient Overseas Container Lines, 219 (221).

Since the carrier's tariff rule provided for the forwarding of cargo, at carrier's expense, from the port of discharge to the bill of lading port without distinguishing between less than trailer load (LTL) lots and trailer load shipments, the shipper was awarded a refund of the cost of transporting by truck LTD cargo from the port of discharge to the bill of lading port. The carrier could not by a statement of policy, no matter how widely published, establish a rule binding on shippers unless such rule was first filed with the Commission under section 18(b) of the Shipping Act of 1916. Accordingly, the carrier's unfiled rule distinguishing between LTL and trailer load shipments could not be relied upon to deny reparation, but itself violated section 18(b)(3) of the Act by denying transportation privileges to LTL shippers in a manner not stated in the carrier's tariff. Id. (221–222).

While a carrier's argument in a misclassification case that an award for the claimant would force it and other carriers to inquire of every shipper as to whether the description of cargo in the bill of lading is correct constituted a compelling equitable consideration, it was not a cognizable legal defense to an award of a refund of overcharges pursuant to section 18(b)(3) of the 1916 Shipping Act. The Commission is not empowered to consider arguments addressed to equitable considerations in matters arising under section 18(b)(3) of the Shipping Act of 1916. Andes Products Export-Emport v. Prudential Lines, Inc., 244 (246–247).

Since the Commission is not empowered to consider arguments addressed to equitable considerations in matters arising under section 18(b)(3) of the Shipping Act of 1916, there was no merit in a misclassification dispute to respondent's contention that the claimant was not entitled to a refund of overcharges because the claimant had been delinquent in researching the applicable tariff and in describing the cargo in the bill of lading. Id. (247).

An action seeking reparation for alleged overcharges was dismissed as a nullity where the complaint named only the carrier's agent as a respondent and did not name the carrier itself. While the named respondent had agreed to a stipulation which stated that it in fact acted as the agent of the carrier, and while it may have been the intent of the stipulation to indicate that the agent or its attorney had informed the carrier of the complaint, section 22 of the Shipping Act of 1916 places exclusive responsibility for furnishing a copy of the complaint on the Commission. Even if section 22 could be interpreted so as to permit the function of furnishing a copy of the complaint to the carrier to be performed by an agent, it would not follow that knowledge of a proceeding commenced against an agent makes the principal a named party to that proceeding. Caterpillar Overseas, S.A. v. South African Marine Corporation (N.Y.), 315 (318).

A tariff item which stated that the charge for a shipment of lesser weight or measurement quantity shall not exceed the charge for shipment of a greater weight or measurement quantity of the same commodity provided justification for the carrier to waive collection of a portion of certain freight charges by applying a rate which covered only shipment of a minimum of 30,000 lbs. to a shipment which actually weighed 29,723 lbs., where the waiver application otherwise satisfied the criteria of section 18(b)(3) of the 1916 Shipping Act. Riviana Foods v. Sea-Land Service, Inc., 320 (322–323).

A tariff item which stated that the charge for a shipment of a lesser weight or measurement quantity shall not exceed the charge for shipment of a greater weight or measurement quantity of the same commodity provided justification for the carrier to waive collection of a portion of certain freight charges by applying a rate which covered only shipment of a minimum of 30,000 lbs. to a shipment which actually weighed 24,642 lbs., where the waiver application otherwise satisfied the criteria of section 18(b)(3) of the 1916 Shipping Act. Douglas Material Company v. Sea-Land Service, Inc., 328 (330).

Ruling of the Settlement Officer dismissing complaint for reparation of freight overcharges is vacated. The Settlement Officer in his dismissal had noted that, as a tariff applicable to the shipment could not be located, a determination on whether the carrier had collected the proper charges could not be made. Dismissal of the complaint under such circumstances would deprive complainant of obtaining relief, not because it had been established that it was not entitled to reparation, but because of lack of information needed to decide the merits. Questions as to whether the charges collected were based on a tariff with the Commission, the identity of the underlying ocean carrier and whether it had an applicable tariff on file, the identity of the shipper on the bill of lading, and whether the bill of lading identified any of the carriers as independent ocean freight forwarders remained unanswered. Since resolution of those questions, among others, might require an evidentiary hearing not available under Subpart S of the Rules, the proceeding would be referred to the Office of the Administrative Law Judges for adjudication under the formal procedure provided in Subpart T of the Rules. The Federal Minister of Defense, Federal Republic of Germany v. Republic International Forwarding Co. and Republic Van and Storage Co. of Los Angeles, Inc., 337, 338.

"Any person" may file a complaint under section 22 of the 1916 Shipping Act whether or not such person has suffered injury. However, to seek reparation a person must show injury and proof of pecuniary loss. Also the complainant must show that it has suffered

real damage. In a claim for refund of freight charges, the complainant must show that it has paid freight or has succeeded to the claim in a valid fashion such as by assignment. No authorities are cited holding that a parent corporation, without more, has standing to seek recovery of damages suffered by its wholly owned subsidiary corporation. Trane Co. v. South African Marine Corp. (N.Y.), 374 (378).

Reparation was denied to a shipper which had been told by an agent of the carrier that the rate applicable to a shipment of motor oil was $96/cubic foot (a temporary rate applicable only to shipments between certain listed ports); which was subsequently advised that the quoted rate was in error and that the shipment rate would be $129.25/ cubic foot (the general commodity rate applicable to motor oil under the carrier's tariff); and which paid the higher rate under protest. The port of destination stated on the bill of lading was not among the ports eligible for the reduced temporary rate; accordingly, the shipment was required to be billed at the general commodity rate. Celestial Mercantile Corp. v. M. Golodetz & Co., Inc., 404 (405–406).

In considering claims for reparation, the determination of the applicable rate shall be based on what can be shown is the true nature of the commodity shipped. Such a determination will be based on all the evidence of record with no single document or piece of evidence necessarily being controlling. Kraft Foods v. Moore-McCormack Lines, Inc., 407 (409–410).

In preparing a bill of lading, it is usually the case that the carrier, in classifying and rating a shipment, must look to the information supplied to him by the shipper or freight forwarder. Elementary fairness dictates that the carrier should be entitled to rely on such information, and to charge and collect freight in accordance with the description supplied by the shipper. To require a carrier to inquire of a shipper whether the latter's description of the goods shipped is correct would place an undue burden on the carrier. Pan American Health Organization v. Prudential Lines, Inc., 412 (414).

The importance of declaring in bills of lading the correct description of the cargo shipped cannot be overemphasized. The carrier has the right to expect that a shipper will properly identify his shipment, just as the shipper has the right to expect the carrier to charge the proper rate for the type of goods actually carried. An equitable rule would seem to limit reparations based on misidentification and misrating to those cases where the actual language used on the face of the bill of lading indicates an improper misclassification or obvious disregard by the carrier of the descriptive language used by the shipper. Further, a shipper who insists upon using a trade name, rather than an appropriate and readily available commodity index description in the filed tariff, should be held to do so at his peril. Id. (414–415).

A shipper was entitled to reparation where, due to misdescriptions of cargo by the shipper, the bill of lading covering the shipment placed the goods shipped in an incorrect class of commodities having a higher shipping rate than that actually authorized for the goods shipped. That the carrier was without fault with regard to the error was immaterial. Id. (415).

A carrier which did not deny the merits of a shipper's claim of overcharge but nonetheless denied the claim on the ground that it was not timely filed under a tariff rule was not only within the rights under its governing tariff, but was required to take the action which it had taken. The unauthorized payment of an otherwise legitimate claim in response to the application of stimuli (e.g., the filing of a reparation complaint with the Commission) while denying all other similar claims in the absence of such stimuli represents precisely the type of discriminatory practice proscribed by section 16 First of the Shipping Act, 1916. SCM Corporation v. Seatrain International, S.A. and Seatrain U.K. Ltd., 417 (419).

A shipper which conclusively proved that goods shipped under the bill of lading description "raw drugs" consisted entirely of Cerelose powder, a form of dextrose, was entitled to reparation in the amount of the difference between the shipping rate for dextrose and the higher rate charged by the carrier, applicable to "harmless drugs." That the rate charged by the carrier had been based on the shipper's own "raw drugs" designation did not detract from the conclusion that a misrating had occurred. Section 18(b)(3) of the Shipping Act, 1916, prohibits a carrier from assessing a charge greater, less or different than the rate specified in its tariff for a particular commodity or service, and does not distinguish between knowing and inadvertent misratings. Abbott Laboratories v. Venezuelan Line, 426 (429).

Whether or not an unlawful charge has been assessed knowingly may be a matter for consideration in determining whether to seek penalties for a violation of the Shipping Act, 1916; it is immaterial, however, to the question whether a violation of the Act has occurred. Id. (429).

A tariff rule barring a claim by a shipper for adjustment of freight charges based on an error in description, unless made in writing sufficiently in advance to permit verification of description before the cargo leaves the carrier's possession, cannot act as a bar to Commission consideration of the claim on its merits. Carborundum Co. v. Royal Netherlands Steamship Co. (Antilles) N.V., 431 (434).

Complainant shipper's product, properly described as Trimet (its registered trade name) or Trimet, Technical Trimethylolethane, or Technical Trimethylolethane, was an alcohol and an ingredient of synthetic resin, as contended by respondent carrier, and not a raw material within the contemplation of respondent's tariff, as contended by complainant. The shipper's claim for reparation (in the amount of the difference between the charged rate for "alcohols, not hazardous" and the lower rate for general organic chemicals or that for synthetic resin) was accordingly denied. CSC International, Inc. v. Orient Overseas Container Line, Inc., 465 (474, 475–476).

A shipper of mine safety hats described by the shipper as "safety hats," "Topgard hats" and "V-Gard Caps" was entitled to reparation in the amount of the difference between the rate for "Hats, N.O.S.," at which the goods were shipped, and the lower rate for "Helmets, N.O.S." In view of the goods' function as protective headgear designed to resist impact from overhead objects, the goods were more akin to helmets or safety hats, which share the characteristic of being protective head coverings made of materials capable of resisting impact to avoid injury to the wearer, then they were to mere hats. MSA International v. Chilean Line, 478 (479).

It is not Commission policy to award costs or attorney's fees as reparation except in the most unusual circumstances. Refrigerated Express Lines (A/ASIA) Pty., Ltd. v. Columbus Lines, 581 (585).

On review of the Settlement Officer's decision granting reparation on an overcharge claim, involving the carrier's trade name tariff rule, the decision is affirmed. The Settlement Officer referred to the Commission decision in *Ocean Freight Consultants v. Royal Netherlands Steamship Co.* (Dkt. 72–39, Report on Reconsideration served Jan. 30, 1975, as having modified if not overruled the decision in Dockets 303(F) and 304(F)), *Johnson & Johnson International v. Prudential-Grace Lines, Inc.* The Officer's statement is misleading inasmuch as the final decision of the Commission in *Johnson & Johnson* is in fact totally consistent with *Ocean Freight Consultants* and could not have been overruled thereby because it was issued later in time. The decision that was modified by *Ocean Freight Consultants* (and by the later decision in *Johnson & Johnson*) was the initial decision in *Johnson & Johnson*. Johnson & Johnson International v. Royal Netherlands Steamship Co., 678.

Although the record offers no reason to disapprove the minimax concept or the particular charges proposed in lease agreements between the Port Authority and carriers or terminal operators, the Commission cannot ignore the fact that the only basis for the lessees' use of the involved piers to date which was not violative of section 15 was under the Port Authority's public tariff and the parties have not adhered to that tariff. The tariff contains no provisions for monthly "on account" billing (pending approval of the agreements) with subsequent adjustments nor does it permit extensions of credit in the unusual amounts and periods which have been extended to several proposed lessees. Moreover, in the case of two piers, one lessee was allowed to continue its exclusive occupancy for five months after the prior lease expired before the Port even declared those facilities to be public piers. This course of conduct represents at least a cooperative working arrangement which was not reduced to writing, filed and approved by the Commission as required by section 15 and constitutes a violation of that statute. It also represents a violation of the Commission's Rules by the Port Authority. The section 15 violation has not proximately injured an objecting terminal operator and it is not entitled to reparations. Agreement No. T–2880, as Amended, 680 (684–685).

The appeal of a nonvessel operating common carrier from the dismissal of its complaint in a proceeding "in the nature of a crossclaim" (seeking "indemnification" from other carriers named as correspondents of complainant in a previously instituted reparation proceeding) was denied on the ground of mootness where the previously instituted reparation proceeding had been dismissed by its presiding officer and that dismissal had not been appealed to the Commission. The "crossclaim" proceeding did not state an independent claim of the complainant, but was entirely contingent upon a finding against the complainant in the previous proceeding; that contingency failed, however, when the prior claim was dismissed by the presiding officer and that dismissal, going unappealed, became the decision of the Commission. Thus, complainant had no claim as to which it could prevail under any circumstances, and the administrative law judge properly dismissed the "cross-claim" action. Interconex, Inc. v. Sea-Land Service, Inc., American Export Lines, Inc. and U.S. Lines, Inc., 714 (716).

The denial of complainant's appeal from the dismissal of its proceeding "in the nature of a cross-claim" which proceeding was contingent for its vitality upon a contingency which had been destroyed by prior action of the Commission, did not deprive the complainant-appellant of its right to due process of law. Id. (716).

—*Administrative or clerical error* (see also negotiated rates)

Application for permission to refund a portion of freight charges is granted where through oversight the contract rate was not extended for the tariff quoting period. The inadvertent failure to extend the rate fell within the intended grounds for such refunds. Andrew Corporation International v. Atlantic Gulf Service, 139 (141).

Application to refund a portion of freight charges is granted where the applicable rate had inadvertently been omitted from a revision of the conference tariff. The conference had changed the format of its tariff to conform to the U.S. Customs Shipper's Export Declaration, and the rate for the commodity had been omitted in the revision. The conference stated that it was not its intent to increase the shipper's rate on the commodity at the time the tariff format was changed. Phillips Petroleum Co. v. Pacific Westbound Conference 143 (147).

Application to refund a portion of freight charges is granted where the tariff for the cargo was inadvertently omitted from a revised tariff. The item had been carried in previous tariffs for over 20 years. The administrative error by which the item was omitted from the revised tariff was clearly of the type for which relief was contemplated

under section 18(b)(3) of the 1916 Shipping Act. The Goodyear Tire & Rubber Co. v. Delta Steamship Lines, Inc., 174 (176).

Pursuant to section 18(b)(3) of the 1916 Shipping Act, as amended by Public Law 90–298 and as further implemented by 46 CFR 502.92, the carrier was permitted to waive collection of a portion of certain freight overcharges where due to an "administrative oversight" the carrier had inadvertently failed to extend a lower rate beyond its applicable expiration date. The waiver would not result in discrimination among shippers; prior to requesting the waiver the carrier had filed a new tariff setting forth the rate upon which the waiver would be based; and the waiver application had been filed within 180 days of the date of shipment. Riviana Foods v. Sea-Land Service, Inc., 320 (322–323).

The carrier was permitted to waive collection of a portion of certain freight charges where, due to a clerical error, the carrier's tariff publishing personnel had published the applicable rate with an incorrect reference which rendered the rate not subject to a certain discount and thus not competitively equal to the rate applicable via other carriers. The waiver would not result in discrimination among shippers; prior to requesting the waiver the carrier had filed a new tariff setting forth the rate upon which the waiver would be based; and the waiver application had been filed within 180 days of the date of the shipment. Kurtin Wool Stock Corp. v. Sea-Land Service, Inc., 324 (326–327).

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A common carrier's application for permission to waive collection of a portion of certain freight charges was granted where there had been a tariff filing error due to inadvertence; the granting of the requested waiver would not result in discrimination among shippers; the shipper had filed a new tariff setting forth the rate upon which the waiver was to be based prior to applying for permission to waive collection; and the application had been filed within 180 days of the shipment involved. Raytheon Co., Inc. v. Sea-Land Service, Inc., 343 (346).

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Application to waive collection of a portion of freight charges is granted where the carrier, through clerical and administrative oversight, had failed to extend the expiration date of the special rate for the commodity shipped. The oversight had occurred during a general rate increase by the carrier, and the carrier had stated that it did not intend to raise the special rate. This type of clerical and administrative error is of the type within the intended coverage of section 18(b)(3) of the 1916 Shipping Act. Shuman Plastics International, Ltd. v. Sea-Land Service, Inc., 496 (498).

Where, due to a clerical error in connection with the reissuing of certain tariff pages, special rates for articles of plumbing fixtures were overlooked, the carrier was permitted to refund a portion of the freight charges which it had collected pursuant to a general rate for the commodities. The error in the tariff was of a clerical or administrative nature and resulted in the failure to withhold a general rate increase from the special rates, as had been promised to the shipper; a refund of a portion of the freight charges would not result in discrimination among shippers; prior to applying for authority to refund, the carrier had filed a new tariff which set forth the rate on which such refund would be based; and the refund application had been filed within 180 days from the date of shipment. Kohler International, Ltd. v. Sea-Land Service, Inc., 565 (568–569).

Where through inadvertence the carrier's tariff agent had not been informed that a certain rate was not to include a congestion surcharge, the carrier was permitted to waive collection of that portion of freight charges on a shipment subject to the rate which was equal to the amount of the surcharge. A waiver of collection of a portion of the freight charges would not result in discrimination among shippers; prior to applying for the waiver, the carrier had filed a new tariff which set forth the rate on which the waiver would be based; and the waiver application had been filed within 180 days from the date of shipment. U.S. Department of Agriculture v. Waterman Steamship Corp., 577 (578–580).

Application for permission to waive collection of a portion of freight charges is granted where the carrier had filed the wrong rate for the commodity. The carrier had stated that the incorrect rate had been filed in error and that the proper rate had been substituted. This is the type of clerical and administrative error within the coverage of section 18(b)(3) of the 1916 Shipping Act. United States Mahogany Corp. v. Solar International Shipping Agency, Inc., 608 (611).

Permission to waive collection of a portion of freight charges is granted where the carrier's tariff clerk had inadvertently published $222.30 instead of the proper rate of $122.30 during a tariff revision. This type of clerical and administrative error is within the intended scope of coverage of section 18(b)(3) of the 1916 Shipping Act. United Forwarders Service, Inc. v. Sea-Land Service, Inc., 636 (638).

Application to waive collection of a portion of freight charges is granted where the rate was erroneously shown in a revised tariff as $270 WM instead of $279 W. This is the type of clerical and administrative error within the intended scope of coverage of section 18(b)(3) of the 1916 Shipping Act. International Paper Co. v. Gulf United Kingdom Conference, 652 (654).

Permission to waive collection of a portion of freight charges is denied. The agreed upon rate had been subject to a minimum of 300 revenue tons, and a falldown in production schedule prevented delivery of that minimum quantity for the vessel. A falldown in production by the manufacturer is not an error in tariff of a clerical or administrative nature, nor it it an error due to inadvertence in failing to file a new tariff. Collins & Aikman Export Corp. v. Barbar Steamship Lines, Inc., 709 (711).

Application to waive collection of a portion of freight charges is granted where the rate for the commodity shipped was inadvertently dropped by the conference tariff filing clerk during the incorporation of a general rate increase. The carrier stated that the omission was the result of clerical mistake and that the rate should have simply been carried forward with the general rate increases. The inadvertent failure of the carrier to extend the rate when it clearly intended to do so presents the kind of situation section 18(b)(3) of the Shipping Act was intended to remedy. Letraset Consumer Products, Inc. v. Lykes Bros. Steamship Co., Inc., 813 (816).

— Burden of proof

In an action for freight overcharges, complainant has a heavy burden of proof once the shipment has left the custody of the carrier. In this case the complainant met its burden of proof and, accordingly, reparation was awarded. Rohm and Haas Company v. Venezuela Line, 9 (11).

The test the Commission applies on claims for reparation involving an alleged error of a commodity classification is what the complainant can prove, based on all the evidence as to what was actually shipped, even if the actual shipment differed from the bill of lading description. However, the complainant has a heavy burden of proof once the shipment has left the custody of the carrier. In this case, the shipper was able to prove that the carrier had incorrectly applied the higher rate for "automobile, bus and truck parts, *viz:* other parts" to shipments of connecting rod assemblies and engine components which should properly have been classified under the lower rate for "automoblie, bus and truck parts, *viz:* cyclinder block assemblies, with or without crankshafts." Accordingly, reparation was awarded. Cummins Engine Co., Inc. v. United States Lines, Inc., 100 (101).

In an action for reparation to recover overcharges, the complainant has a heavy burden of proof once the shipment has left the custody of the carrier. In this case, the carrier met his burden of proof and was awarded a refund. Union Carbide Inter-America, Inc. v. Venezuela Line, 126 (127).

The general rule in a misclassification dispute is that what is actually shipped determines the applicable rates. However, where the shipment has left the custody of the carrier and the carrier is thereby prevented from verifying the claimant's contentions, the claimant has a heavy ultimate burden of proof to establish its claim. In this case, claimant was able to substantiate its claim, on the basis of invoices and statements from the supplier and from the merchandiser, that pencils carried by respondent were not mechanical and therefore should have had applied to them the rate for "Pencils, Not Mechanical" rather than the rate for "Pencils, N.O.S." Andes Products Export-Import v. Prudential Lines, Inc., 244 (246–247).

Reparation is denied where the shipment left the custody of the carrier and the carrier was prevented from verifying the claimant's contention as to the total measurement of the shipment. Claimant failed to sustain the heavy burden of proof required in such cases. Claimant's packing list indicated a total measurement of 798 cubic feet, whereas the Mate's receipt showed that the cartons were measured on receipt of the cargo at the dock prior to shipment, and measured 898 cubic feet. Claimant had had ample opportunity to request remeasurement by the carrier in accordance with provisions of the bill of lading. United Decorative Flower Co., Inc. v. Maersk Line, 340 (341–342).

In considering claims involving disputes as to the nature of cargo (either weight, measurement or description) if the cargo has left the custody of the carrier before the claim is brought and the cargo cannot be reexamined, the complainant bears a heavy burden of proof. In the instant case, complainant met that burden of proof. Kraft Foods v. Moore-McCormack Lines, Inc., 407 (410–411).

In a reparation proceeding based upon incorrect description on the bill of lading of the goods shipped, where the shipment has left the custody of the carrier and the carrier is therefore prevented from personally verifying the shipper's claimed description of the goods shipped, the shipper has a heavy burden of proof and must establish with reasonable certainty and definiteness the validity of its claim. Pan American Health Organization v. Prudential Lines, Inc., 412 (414).

While the carrier has a right to expect that the shipper will properly identify the goods contained in a shipment, the shipper similarly has the right to expect the carrier to

charge the proper rate for the actual goods carried. Where a mistake occurs, the party who commits it has the heavy burden of proof to support a claim for rectification. Abbott Laboratories v. Venezuelan Line, 426 (428).

In determining whether complainant has met its burden of proving the true nature of a commodity shipped, considerations of size and experience of shipper and frequency of shipments made have nothing to do with proof of the nature of the commodity, and in any event the Commission has previously disavowed equity theories regarding overcharge claims. Carborundum Co. v. Royal Netherlands Steamship Co. (Antilles) N.V., 431 (435–436).

Complainant carried its burden of proof on an overcharge claim to show the true nature of the commodity shipped by affirmative evidence, especially inasmuch as respondent failed to answer, plead or otherwise appear throughout the course of the proceeding. Id. (436).

In rating a shipment of chemical goods, respondent shipper properly applied Rule 4 of its North Atlantic/Far East Tariff FMC–6, which provides that a correct description of the goods may be arrived at by comparison of the shipper's bill of lading description and the description contained in the shipper's Export Declaration. Such use of the Export Declaration does not constitute an extension of the bill of lading, but operates as a "check and balance" similar to those exercised by the various branches of government under the U.S. Constitution. Such a check and balance is desirable, particularly in an age of containerization; a carrier should not be bound by a shipper's misdescription of the goods in the bill of lading. CSC International, Inc. v. Orient Overseas Container Line, Inc., 465 (471–472).

Complainant's contention that the presiding officer in a reparation proceeding held the bills of lading to be the sole proof of the transaction between the parties, to the exclusion of all other evidence, was rejected. The presiding officer recognized, in making his decision, that even though the bill of lading sets forth the terms and conditions in the contract of affreightment, it is not conclusive as to the description of the goods shipped, and that a shipper who challenges that description may introduce whatever evidence he has to prove his allegations as to what actually moved, even where the bills of lading and other shipping documents were prepared by the shipper or his agent. E.S.B. Inc. v. Moore-McCormack Lines, Inc., 480 (481).

The presiding officer in a reparation proceeding correctly found that complainant shipper had presented insufficient evidence to prove that certain cartons were not only skidded but also externally crated on all sides so as to qualify for a lower freight charge. The bills of lading covering the goods described the packages as "skidded cartons," and made no reference to crates; letters from the goods' packers stating that the cartons were packed in wooden crates made no reference to any records prepared at the time that goods were packed, nor any mention of the date the packaging was done; complainant did not answer the respondent's argument that had the cartons been crated, the measurements on the packing lists and those shown on the packer's letters and the bill of lading could not have been identical, as they were; complainant's packing lists referred to the shipments only as "box," "wood box," and "pallet box"; and no explanation of the reason for the use of any special packaging for the shipment was offered. Accordingly, the shipper failed to meet its heavy burden of proving that respondent carrier had violated section 18(b)(3) of the Shipping Act, 1916, and its claim for reparation was properly denied. Id. (482,489–490).

In a misclassification dispute, where the articles shipped are no longer in the possession of the carrier, the claimant had a heavy burden of proof to establish his claim. In this case claimant was able to prove that a commodity described in the bill of

lading as "Dental Investment Multi-Vest" and rated on the basis of a "Cargo, N.O.S." was a refractory material and should have been rated on the basis of the commodity description, "refractory mixes, plastic and castable." Hoblemann International, Inc. v. Moore-McCormack Lines, Inc., 572 (573, 575–576).

The Export Declaration Schedule B Commodity Numbers established by the United States Customs Service are not the commodity descriptions controlling in a misclassification dispute. What counts is the commodity description and rate on file with the Federal Maritime Commission at the time of shipment. Accordingly, where the claimant had been able to prove that a commodity described in the bill of lading as "Dental Investment Multi-Vest" was a refractory material which had improperly been rated on the basis of a "Cargo, N.O.S.," the claimant was entitled to reparation based on the only commodity description in the applicable tariff closely resembling the shipment ("refractory mixes, plastic or castable") and not on the basis of the Schedule B rate for "fire ground clay." Id. (573–574, 576).

Reparation is awarded on a shipment of food freezers. The carrier had rated the shipment as Food Freezers, Mechanical, N.O.S. The shipper introduced evidence showing that the freezers should have been rated as Food Freezers, Mechanical Household. While the bill of lading had identified the commodity as Electric Commercial Freezers, complainant had corrected the export declaration form to state Electric Household Freezers and had requested correction of the consular invoice to reflect that change. Complainant submitted information from the manufacturer showing the freezers to be household freezers, as well as its order to the manufacturer, which specified freezers identified by the manufacturer as household freezers. Alfred Kubies Western Corp. v. Royal Netherlands Steamship Co., 633 (635).

In a proceeding to recover alleged freight overcharges resulting from the misrating of a shipment as "Tractors and parts N.O.S. packaged," rather than "Tractor parts for assembly purposes (not replacement) packaged," a "special note" offered in lieu of an unavailable packing list provided little in the form of proof as to the nature of the goods shipped. The note was a statement prepared almost two years after the date of shipment, was written on plain white paper, and was signed by an individual purporting to be an "export rate analyst." The note asserted that the shipment consisted of "tractor parts for assembly." No mention was made in the note of whether the individual was at the time of the shipment or was now in the shipper's employ, nor did it state what was the source of the individual's knowledge on the matter. Caterpillar Tractor Co. v. United States Lines, Inc., 673 (674).

In a proceeding to recover alleged freight overcharges resulting from the misrating of a shipment as "Tractors and parts N.O.S. packaged" rather than "Tractor parts for assembly purposes (not replacement) packaged," shipper's invoice sheets submitted to show the nature of the shipment were of little probative value. The only nexus between the invoices and the bill of lading consisted of a handwritten notation number, and, even assuming that the handwritten annotations were made at the time, and reflected the dates the listed items were forwarded to the carrier, there was no indication, nor could it be ascertained on the face of the invoices, that they represented a complete list of what the two containers in the shipment actually held. Id. (674).

In a proceeding to recover freight overcharges resulting from the alleged misrating of a shipment as "Tractors and parts N.O.S. packaged," rather than "Tractor parts for assembly purposes (not replacement) packaged," the fact that the Caterpillar Tractor Co. was the shipper and the bill of lading described the shipment as "Manufacturer's parts for assembly" did not compel the conclusion that the shipment consisted of tractor parts for assembly. The Caterpillar Tractor Co. is not synonymous with tractor, and the

complaint described that company as being engaged in the manufacture of moving equipment not limited to tractors. Id. (674–675).

Where containers were loaded by the shipper and the bill of lading was prepared by the shipper's agent, it was reasonable to presume, in the absence of proof to the contrary, that the agent knew the contents of the containers and properly classified and rated the cargo. Id. (675).

The failure of a respondent in a reparation proceeding to answer does not preclude examination of the proof offered by complainant by the Commission. Thus, complainant's contention that its claim should be treated as being established because respondent did not reply to the complaint was without merit. Id. (675).

The settlement officer, in a reparation proceeding alleging overcharges as the result of the misrating of certain cargo, properly denied reparation. The rating of the cargo had been consistent with the bill of lading and the shipper's agent's description of the cargo. Complainant failed to offer sufficient evidence of misrating. Id. (676).

A shipper was entitled to reparation for overcharges paid in connection with shipments of beads where the shipments had been charged at the rate for beads having value in excess of $1,400 per revenue ton but had actually included some cartons of beads having values below $1,400 per revenue ton, which were subject to lower rate. While the bill of lading covering the shipments did not state the value of the beads shipped, the shipper's claim, based on commercial invoices stating the invoice value of identifiable cartons and certificates and lists of measurement and weight for each group of cartons, was properly computed and adequately substantiated and established the existence of the overcharges alleged. Stanislaus Imports, Inc. v. Sea-Land Service, Inc., 757 (759–760).

A carrier's application for permission to refund a portion of certain freight charges was granted where the shipper's claim of overcharge was clearly valid and where the carrier had stated in its reply that the claim was correct and that it had previously declined to refund the overcharge solely because such action was time barred by its applicable tariff. Bristol-Myers Co. v. Sea-Land Service, Inc., 761 (762–763).

In a reparation proceeding alleging improper designation of cargo value by the carrier, where critical information concerning the disputed shipment is entirely in the possession of the shipper, the Commission has consistently required that the shipper present clear proof that the original shipping documents were in fact erroneous before the carrier will be found to have violated section 18(b)(3) of the Shipping Act, 1916. Accordingly, a shipper's claim for reparation alleging improper valuation of the cargo by the carrier was denied where the carrier's copy of the Export Declaration provided by an agent of the shipper (upon which the valuation of the cargo had allegedly been based) had been misplaced and where the shipper, which based its claim entirely on the value stated in a sales invoice bearing an incomplete date, failed to introduce its copy of the Export Declaration or any other evidence to corroborate or verify the accuracy of the sales invoice or to refute the carrier's assertions. Borden Interamerica, Inc. v. Venezuelan Lines, 777 (778).

— Carrier's six-month tariff rule

The filing of a timely complaint with the Commission effectively overrides any tariff technicality under which an overcharge claim legally may be denied by a water carrier subject to the Commission's jurisdiction during the two-year period for recoving reparation set forth in section 22 of the Shipping Act of 1916. Accordingly, complainant was entitled to a refund of ocean freight charges on a shipment of industrial tires which were in excess of those lawfully applicable at the time of the transportation in violation

of section 18(b)(3) of the Act where the carrier denied the claim solely on the basis of a tariff provision which time bars claims for adjustments of freight charges not received by the carrier within six months after date of shipment. Uniroyal, Inc. v. Hapag-Lloyd Aktiengesellschaft, 1 (2–3).

Complaint for freight overcharges was timely filed with the Commission where it was filed approximately 13 months after the bill of lading date, even though complainant had failed to comply with a provision of the applicable tariff that claims for adjustment be presented to the carrier within six months after the date of shipment. The Commission, in *Colgate Palmolive Company* v. *United Fruit Company* (Informal Docket No. 115(I)), ruled that a claim filed with the Commission within two years from the date the cause of action arose must be considered on its merits. Rohm and Haas Company v. Venezuela Line, 9 (10–11).

Complainant was entitled to a refund of freight overcharges where the merits of its claim were not at issue and carrier had denied the claim solely on the basis of a tariff provision which time bars claims for adjustments of freight charges not received by the carrier within six months after date of shipment. The complaint was filed within two years of the alleged injury and thus was timely filed in accordance with section 22 of the 1916 Shipping Act. Union Carbide Inter-America, Inc. v. Venezuela Line (Cia. Anonima Venezolana de Navegacion), 85 (87).

A claim for reparation which is brought under the 1916 Shipping Act cannot be barred on the merits by a conference rule if the claim is filed with the Commission within two years of its accrual. Union Carbide Inter-America, Inc. v. Venezuelan Line (Cia. Anonima Venezolana de Navegacion), 97 (99).

The Commission has ruled that a claim filed within two years from the date the cause of action arose must be considered on its merits. Accordingly, shipper's claim for reparation was timely filed where the shipment moved on February 28, 1974 and the claim was filed with the Commission on November 11, 1975. The fact that the shipper had failed to comply with a tariff provision requiring that claims be filed with the carrier within six months after the date of shipment was not material. Union Carbide Inter-America, Inc. v. Venezuela Line, 126.

A shipper was entitled to reparation for an overcharge resulting from the application of an admittedly incorrect rate where the shipper filed its complaint for reparation within two years of the carrier's denial of its claim for return of the overcharge and where the shipper's evidence was sufficient to establish the fact and amount of overcharge. The carrier's denial of the shipper's claim had been based, not upon any dispute with the shipper's assertions, but on the ground that its lawfully filed tariff did not permit refunds on claims filed more than six months after the date of shipment; the filing by the shipper of a timely complaint to the Commission effectively eliminated this tariff technicality. National Starch & Chemical Corp. v. Atlantic Container Line. Ltd. 393 (395).

Where a tariff rule provided that "Except for those claims for obvious error in calculation or misapplication of rate or rate basis, all claims of adjustment of freight charges must be presented to the carrier in writing within six months after the date of shipment," the assessment of a rate which differed from that provided by the tariff clearly fell within the exception provided in the tariff rule as it related to "misapplication" of a rate. Caterpillar Overseas, S.A. v. Springbok Line, Ltd., 640 (642-643); Caterpillar Overseas, S.A. v. South African Marine Corp., Ltd., 644 (646-647); Caterpillar Overseas, S.A. v. Springbok Shipping Co., Ltd., 648 (650-651).

In instances where the misapplication of a rate has occurred, and a direct claim to the carrier is time barred by rule contained in the applicable tariff, the shipper's remedy is to file a complaint seeking redress before the Commission within the two-year period

specified by section 22 of the Shipping Act, 1916. Bristol-Myers Co. v. Sea-Land Service, Inc., 761 (763).

— Intended use of cargo

In a misclassification dispute as to whether the carrier had properly refused to classify a cargo under the tariff item for rubber commodities titled "Synthetic (Not Articles or Materials manufactured therefrom)," the claimant's request that the presiding officer's initial decision denying a refund be clarified was granted where the presiding officer apparently based his decision, inter alia, on the intended use of the rubber goods by the ultimate user and on the officer's assessment of the hazards involved in transporting the cargo "into a troubled zone of the world." A more disciplined and logical approach, relying on the settled principle that the final application of a product with several possible end uses is immaterial to the proper classification of the commodities for tariff purposes, was required; following such an approach, an order denying the complaint was issued. Crestline Supply Corporation v. The Concordia Line and Boise-Griffin Steamship Co., Inc., 207 (209, 211, 213).

In a misclassification dispute where the primary factual question was whether a cargo of rubber sheets and tapes had been "manufactured from" synthetic rubber at the time it was shipped, there was no relevance to claimant's evidence aimed at proving that the goods were not "completely finished" in that further processing was required before they could be finally installed in the water conservation equipment for which they were ultimately intended. The final application of a product with several possible end uses is immaterial to the proper classification of commodities for tariff purposes. The applicable freight rate should depend upon the intrinsic nature and market value of the goods themselves, rather than a shipper's representation as to the intended use of goods, as it would be virtually impossible for ocean carriers to ascertain whether each item transported is subsequently put to the use for which it was rated for ocean transportation. Id. (211).

— Interest

A shipper of mine safety hats (described by the shipper as "safety hats," "Topgard hats" and "V-Gard Caps") who was overcharged when the safety hats were rated as "hats" and not as "helmets" by the carrier was not entitled to an award of interest on the amount of the overcharge since the carrier's misclassification was due to a great extent to the shipper's failure to describe its product properly. MSA International v. Chilean Line., 478 (479).

— Misinterpretation of tariff

Application for permission to waive collection of a portion of freight charges is denied where both the consignor and his forwarder shipped the cargo without first checking the rate. Misinterpretation of a tariff is not subject to rectification under P. L. 90-298, and the failure of a consignor or forwarder to check a rate prior to shipment is not the kind of circumstance for which section 18(b)(3) of the 1916 Shipping Act affords relief. Homasote Co. v. United States Lines, Inc. 89 (91).

— Negotiated rates

Waiver of collection of a portion of freight charges will be permitted where the carrier

failed to file the negotiated rate in its tariffs. There was an error due to inadvertence in the failure to file the rate. Commodity Credit Corporation v. Surinam Navigation Co., Ltd. 65 (68).

Permission to waive collection of a portion of freight charges arising from the shipment of goods to Spain is granted where, through inadvertence, the tariff publishing officer instructed publication of the agreed upon rate to other ports instead of Spanish ports. This is the type of error that can be remedied pursuant to section 18(b)(3) of the 1916 Shipping Act. The Buckeye Cellulose Corp. v. Sea-Land Service, Inc., 170 (173).

Application to waive a portion of freight charges is granted where, through oversight, the agreed upon rate was not published before the sailing on which the cargo was carried. The carrier's tariff publishing officer was unaware that the rate was to be published on the day it was received, but had followed the usual practice of posting the rate for the following sailing. This type of error was quite clearly an administrative oversight of the kind contemplated by section 18(b)(3) of the 1916 Shipping Act. Wyandot Exporting Co. v. Sea-Land Service, Inc., 178 (181).

The inadvertent clerical omission of agreed freight rates from a carrier's tariff, which was compounded by a second error, the insertion of an inaccurate freight rate in place of the agreed rate upon discovery of the original omission, constituted an error permitting waiver of collection of freight charges within the contemplation of section 18(b)(3) of the Act. Raytheon Co., Inc. v. Sea-Land Service, Inc., 343 (344-346).

The inadvertent clerical omission of agreed freight rates from a carrier's tariff, which was compounded when, upon discovering the omission, the clerk inserted an inaccurate freight rate in place of the agreed rate, constituted an error permitting waiver of collection of freight charges within the contemplation of section 18(b)(3) of the Act. Raytheon Co., Inc. v. Sea-Land Service, Inc., 347 (348-350).

Where due to a clerical error the carrier had failed to file a special rate for shipments of caustic soda weighing a minimum of 599 tons per vessel as had been promised to the shipper, the carrier was permitted to waive collection from the shipper of a portion of freight charges on a shipment of the subject commodity. A waiver of collection of a portion of the freight charges would not result in discrimination among shippers; prior to applying for the waiver, the carrier had filed a new tariff which set forth the rate on which the waiver would be based; and the waiver application had been filed within 180 days from the date of shipment. Dow Chemical International, Inc. v. Far Eastern Shipping Co., 604 (605–607).

Application to waive collection of a portion of freight charges is granted where the agreed upon rate of $210.00 W/M minimum weight 22.5 measurement tons was incorrectly transcribed as $210 W/M minimum weight 25 measurement tons. The carrier had stated that the transmittal of the incorrect minimum weight was due to clerical error. This is the type of administrative or clerical error within the intended scope of coverage of section 18(b)(3) of the 1916 Shipping Act. Footner and Co., Inc. v. Sea-Land Service, Inc., 718 (719).

Application to waive collection of a portion of freight charges is granted where, through clerical error, the agreed upon rate was erroneously symbolized as an increase effective on full statutory notice of 30 days, whereas it should have carried a teardrop of (R) reduction symbol, which would have permitted it to be in effect at the time of the shipments in question some two weeks later. This type of clerical error is within the intended scope of section 18(b)(3) of the 1916 Shipping Act. Kuhne & Nagel v. Sea-Land Service, Inc., 725 (729).

Permission was granted to waive collection of a portion of the freight charges assessed by a carrier in connection with the shipment of an automobile where, due to poor

communications and a lack of understanding of the Commission's regulations by a foreign agent of the carrier, an agreed lump sum rate for the shipment was not transmitted to the carrier's office in New York until after the shipment had been completed, which resulted in an overcharge. The carrier's error was an "error due to inadvertence in failing to file a new tariff" within the meaning of section 18(b)(3) of the Shipping Act, 1916; waiver would not result in discrimination among shippers; the carrier had filed a new tariff setting forth the agreed rate prior to applying for authority to waive collection; and the carrier's application had been filed within 180 days from the date of shipment. The Permanent Mission of the Socialist Republic of Romania v. Prudential Lines, 731 (733).

A carrier was granted permission to waive collection of a portion of freight charges assessed in connection with a shipment of empty metal shipping containers where, after agreeing with the shipper on a rate per weight ton to cover the shipment, the carrier's Oakland office mistakenly transmitted to a second office a weight or measurement option for the rate, which error was carried forward to the actual publication of the rate tariff, resulting in an overcharge. The carrier's transmission error was "an error in a tariff of a clerical or administrative nature" within the meaning of section 18(b)(3) of the Shipping Act, 1916; waiver of collection would not result in discrimination among shippers; the carrier had filed a corrected tariff prior to applying for permission to waive collection; and the application for permission to waive was filed within 180 days from the date of the subject shipment. Ford Motor Co. v. Sea-Land Service, Inc., 741 (743–744).

A carrier was permitted to waive collection of freight charges assessed in connection with a shipment of Gilsonite where the carrier had erroneously caused the rate agreed upon with the shipper to expire prematurely, and had then failed, due to oversight, to extend the rate and apply it to the shipment involved, causing an overcharge. The carrier's clerical and administrative errors were of the type within the intended coverage of section 18(b)(3) of the Shipping Act, 1916 and section 502.92 of the Commission's Rules of Practice and Procedure; waiver of collection would not result in discrimination among shippers; the carrier had filed a new tariff setting forth the rate on which its application for permission to waive collection was based prior to filing the application; and the application was filed within 180 days from the date of the shipment involved. American Gilsonite Co., Inc. v. Lykes Bros. Steamship Co., Inc., 747 (748–749).

Where due to clerical error the carrier's tariff agent had failed to file a reduced rate as had been promised the shipper, the carrier would be permitted to waive collection from the shipper of a portion of the freight charges on cargo it had transported under a higher tariff rate. A waiver of collection of a portion of the freight charges would not result in discrimination among shippers; prior to applying for authority to waive collection of the freight charges, the carrier had filed a new tariff which set forth the rate on which the waiver would be based; and the waiver application had been filed within 180 days from the date of the subject shipment. P.C. International, Inc. v. Sea-Land Service, Inc., 766 (767–769).

The Commission's settlement officer was required to consider on its merits a timely filed reparation claim, despite the fact that the claim had already been settled between the parties by payment in full of the reparation sought. White-Westinghouse Int'l. Co. for N. V. Technische Handelmaatschappiz v. Sea-Land Service, Inc., 770.

A reparation proceeding involving an overcharge of freight charges assessed in connection with a shipment of refrigerators was dismissed upon findings by the settlement officer that respondent carrier had concurred in and had paid in full the

amount of the reparation sought, and that the validity of the shipper's claim was adequately established by the pertinent documentation. Id. (771–772).

Where due to clerical error the carrier had failed to file a special reduced rate as had been promised the shipper, the carrier would be permitted to waive collection from the shipper of a portion of the freight charges assessable on cargo it had transported under a higher general tariff rate. A waiver of collection of a portion of the freight charges would not result in discrimination among shippers; prior to applying for authority to waive collection of the freight charges, the carrier had filed a new tariff which set forth the rate on which the waiver would be based; and the waiver application had been filed within 180 days from the date of the subject shipment. Universal Nolin UMC Industries, Inc. v. Sea-Land Service, Inc., 779 (781-782).

Where due to an administrative error the carrier had failed to except a certain rate, which it had promised the shipper, from a general rate increase, the carrier would be permitted to refund to the consignee, who bore the cost of transportation, a portion of the freight charges on one shipment of the subject commodity and to waive collection from the consignee of a portion of the freight charges on three other shipments of the commodity. A refund or waiver of collection would not result in discrimination among shippers; prior to applying for authority to refund or waive collection of a portion of the freight charges, the carrier had filed a new tariff which set forth the rate upon which the refund and waivers would be based; and the refund and waiver applications had been filed within 180 days from the date of the subject shipment. Toei Kogyo Co. Ltd. v. Sea-Land Service, Inc., 783 (784–786).

Carrier's application for permission to waive collection of freight charges was granted where the carrier, after agreeing with shipper to maintain a special rate beyond its scheduled expiration date to the end of the year, failed due to administrative error to except the special rate from a general increase in the applicable tariff which had been in process at the time of the carrier's agreement with the shipper and which went into effect prior to the agreed expiration date of the special rate, causing an overcharge. The carrier's error was "an error in a tariff of a clerical or administrative nature" within the meaning of section 18(b)(3) of the Shipping Act, 1916, and section 502.92 of the Commission's Rules of Practice and Procedure, and the carrier's application complied in all respects with the requirements specified in the Act. Brunswick Corp. v. Sea-Land Service, Inc., 801 (803–804).

Application to waive collection of a portion of freight charges is granted where the negotiated rate was incorrectly named to Lisbon, Portugal, instead of Bilbao, Spain. The naming of the rate to the wrong port was due to clerical and administrative error. Carriers are authorized to make voluntary refunds and waive collection of a portion of freight charges for good cause such as bona fide mistake. Smith & Johnson (Shipping), Inc. v. Sea-Land Service, Inc., 805 (808).

Application to waive collection of a portion of freight charges is granted where a confirming teletype requesting publication and the effective date of the agreed-upon rate went astray in transmittal between the carrier's sales agent and its tariff publication department. As a result, the required tariff publication was not made. Thus, there was an error due to inadvertence in the failure to file the tariff. Union Carbide Corp. v. Sea-Land Service, Inc., 809 (812).

— Port equalization

A carrier was not permitted to charge the consignee the entire cost of ground transportation of the cargo from Oakland (the port of its actual discharge) to a

destination point designated by the consignee but was permitted to collect an amount equal to the cost of drayage from San Francisco (the port of discharge named in the bill of lading) to the designated destination point, where a rule in the applicable tariff provided that when cargo is discharged at a port other than that named in the bill of lading and is then transported by the carrier to a destination point designated by the consignee, the consignee remains responsible for the cost which it normally would have incurred to move the cargo to its point of destination had the cargo been discharged at the port named in the bill of lading. There was no merit to the carrier's contention that the tariff rule was not applicable since Oakland and San Francisco are "Bay area ports." Konwal Co., Inc. v. Orient Overseas Container Line, 58 (59–60).

A shipper was able to establish with sufficient clarity that the port of discharge named in certain bills of lading was San Francisco and not Oakland (where the cargo had actually been discharged), notwithstanding that the shipper was not able to produce the bills of lading but only invoices which indicated Oakland as the port of discharge. It is a common steamship practice to identify bills of lading by port of loading and port of discharge, and the invoices in question, in referring to the bills of lading, contained the annotation "B/L HK-SF." In addition, the carrier failed either to deny that San Francisco was the bill of lading port or to provide copies of the bills of lading, but merely asserted that the shipper's proof was insufficient. This characterization of the shipper's proof did not constitute a sufficient denial of material facts alleged in the complaint for purposes of complying with Rule 5(d) of the Commission's Rules of Practice and Procedure which provides that material facts in a complaint will be taken as admitted unless specifically denied. Accordingly, the shipper was entitled to a refund of the cost of transporting the cargo by truck from Oakland to San Francisco under a tariff rule which provided that, if a cargo is not delivered to the port of discharge named in the bill of lading, the carrier is obligated to pay the cost of transporting the cargo from the actual port of discharge to the port of discharge named in the bill of lading. F. Powers Co., Inc. v. Orient Overseas Container Lines, 219 (219–221).

Where a carrier discharged goods destined for the port of San Francisco at its port of delivery at Oakland and moved the goods overland truck collect to the port of discharge shown on the bill of lading, the shipper was entitled to reparation in the amount of its "port equalization" claims (based on the excess of the trucking rates from Oakland to San Francisco over the drayage rates within San Francisco, which the shipper would have had to pay in any case). Rule 28 of the carrier's Hong Kong Eastbound Pacific Coast Tariff No. 1 (FMC–1) provided that a carrier discharging cargo at a point other than that specified in the bill of lading could arrange for movement of the goods, at its own expense, to that designated by the consignee of the goods; since such movement had been undertaken at the expense of the shipper, the carrier was liable for the overcharge under section 18(b)(3) of the Shipping Act, 1916. Vandor Imports v. Orient Overseas Container Lines, 396 (397–398).

— Settlements

Where a shipper's claim for refund of overcharges was denied by the carrier on the ground that it was not timely filed under the applicable tariff, and the shipper thereupon brought a complaint for reparation before the Commission, whereupon the carrier offered to pay the shipper's claim and requested that the settlement officer discontinue the docket, the request for discontinuance could not be granted prior to determining the merits without placing the carrier in violation of its governing tariff and the Commission's statutes. Accordingly, in order to prevent the carrier from being charged with a

violation of section 18(b)(3) of the Shipping Act, 1916, as amended, the requested reparation was granted on a finding that the shipper proved its case. SCM Corp. v. Seatrain International, S.A. and Seatrain U.K., Ltd., 417 (418–419).

The Commission could not ratify the presiding officer's approval of a settlement agreement entered in a proceeding on a claim for reparation on an alleged freight overcharge where a violation of section 18(b)(3) of the Shipping Act of 1916 had not been established by the presiding officer and where respondents had specifically advised the Commission that the settlement was not to be construed as an admission of any violation on their part. An agreement to settle a claim for reparation based on an allegation of a violation of section 18(b)(3) can be approved only on an affirmative finding that such violation occurred. The Federal Minister of Defense, Federal Republic of Germany v. Republic International Forwarding Company and Republic Van and Storage of Los Angeles, Inc., 569 (570).

A presiding officer's ruling dismissing a proceeding on a claim for reparation for an alleged freight overcharge was vacated and remanded for whatever action the officer and the parties deemed warranted where the dismissal had been premised on the Commission's approval of a settlement agreement between the parties which did not contain a finding of a violation of section 18(b)(3) and which the Commission was thus without authority to approve. Id. (570).

The fact that the law and Commission rules encourage settlements and engage in every presumption that such settlements are valid and lawful does not mean that the Commission must act as a rubber stamp in evaluating settlements, especially when the settlements themselves require approval under section 15 of the 1916 Shipping Act. Refrigerated Express Lines (A/ASIA) Pty. Ltd. v. Columbus Lines, 581 (582, 584).

Complaint alleging improper eviction of vessel to permit berthing of respondent's vessel, and that respondent's vessel caused a break in the bus bar conductor system which had the effect of precluding the movement of container cranes at another terminal, with the result that complainant could not utilize dockside space at that terminal, is dismissed with prejudice. The parties had entered into a statement of satisfaction and settlement whereby respondent had agreed to pay complainant $10,000 in satisfaction of the alleged claims upon dismissal of the complaint with prejudice. Sea-Land Service, Inc. v. The City of Anchorage, Alaska and Totem Ocean Trailer Express, Inc., 617.

Complaint seeking refund of overcharge is dismissed where the claim at issue had been properly settled subsequent to the filing of the docket with the Commission. There was no tariff or regulatory provision which barred the parties from informally taking such action. Caterpillar Overseas, S.A. v. Springbok Line, Ltd., 640 (643); Caterpillar Overseas, S.A. v. South African Marine Corp., Ltd., 644 (647); Caterpillar Overseas, S.A. v. Springbok Shipping Co., Ltd., 648 (651).

While in ordinary circumstances a carrier could be admonished for taking unilateral action in settling a claim for overcharges while a proceeding was before the Commission relating to the claim, and thereby prejudging the decision that might be rendered, the settlement officer finds, from a regulatory standpoint, that the conference tariff did not prohibit an informal settlement of the rate issue and there was, therefore, no legal necessity to bring the matter before the Commission for decision. This position is based upon the fact that an informal settlement of the claims was not time barred by Rule 16 of the tariff as the carrier apparently believed. A careful review of the applicable rule revealed that it did not extend to errors involving the mere misapplication of a rate, which was the issue in the docket. Id. (642); (647); (650).

It is preferable that a settlement officer who dismisses a claim for reparation for alleged overcharges, on the grounds that the claim has been paid in full, make specific

findings in the order of dismissal on the question of whether settlement by payment results in payment of applicable tariff rates under section 18(b)(3) of the 1916 Shipping Act. While settlement of litigation is to be encouraged, it is the Commission's responsibility to assure that such settlements in matters involving section 18(b)(3) do not result in payment of charges for transportation which would not otherwise be permitted. To do otherwise could result in use of the Commission's offices to gain approval of inapplicable rate. Soko Hardware v. Y. S. Lines, 708.

A complaint alleging that the carrier had refused to honor an otherwise legitimate overcharge claim was dismissed, and the proceeding initiated thereby, discontinued where complainant advised the settlement officer that it had received a refund check from the carrier as full settlement of the overcharge claim and where a review of the complaint, support documentation and the involved tariff confirmed the complainant's overcharge allegation and justified the carrier's refund action. GTE International, Inc. v. Atlantic Lines, Ltd., 764 (765).

Shipper's complaint seeking reparation for freight overcharges was dismissed and the reparation proceeding discontinued where respondent carrier, which had concurred in the shipper's claim but had been unable to refund the charges on the ground that the shipper's direct claim to the carrier was time barred by the applicable tariff, had sent the shipper a check in full payment of the claim, and where an analysis of the complaint and supporting documentation and of validity of the shipper's claim and, consequently, the propriety of the carrier's refund. National Starch & Chemical Corp. v. Sea-Land Service, Inc., 799 (800).

— Statute of limitations

Authority to refund a portion of freight charges is denied where the carrier failed to file with the Commission a tariff setting forth the rate upon which the refund would be based within 180 days from the shipment. Airflex Industries Reliable Cargo Shipping A/C v. Lykes Bros. S/S Co., Inc., 16 (17).

Complainant shipper whose application for a refund of a portion of freight charges was denied because of the carrier's failure to file with the Commission a tariff setting forth the rate upon which the refund would be based within 180 days from the date of the shipment was not precluded from filing a complaint under section 22 of the Act, alleging violation of any section of the Act, such as sections 16 or 17, and asking reparation for any injury caused by such alleged violation. Id. (17).

Authority to refund a portion of freight charges is denied where the carrier failed to file with the Commission a tariff setting forth the rate upon which the refund would be based within 180 days from the shipment. Perkins-Goodwin Co., Inc. v. Lykes Bros. Steamship Co., Inc., 21 (22).

Complainant shipper whose application for a refund of a portion of freight charges was denied because of the carrier's failure to file with the Commission a tariff setting forth the rate upon which the refund would be based within 180 days from the date of the shipment was not precluded from filing a complaint under section 22 of the Act, alleging violation of any section of the Act, such as sections 16 or 17, and asking reparation for any injury caused by such alleged violation. Id. (22).

Pursuant to the Commission's formal complaint procedures (46 CFR § 505.62) and informal docket procedures (46 CFR § 502–301 et seq.), a claim for reparation on overcharges of ocean freight may be filed within two years from the date of the accrual of a cause of action. Homasote Co. v. United States Lines, Inc., 89.

Complaint seeking reparation of freight overcharges was timely filed when filed on the

Monday after Sunday, the last day of the two-year limitation period. The Commission's offices were also closed on the preceding Saturday. Dismissal of the complaint for late filing would have caused undue hardship. Therefore, the Commission, in its discretion, waived pursuant to Rule 1(j) the exception of Rule 5(c) contained in Rule 7(a), so that by making Rule 7(a) applicable to the computation of the two-year limitations period, the filing of the complaint was timely. CSC International, Inc. v. Waterman Steamship Corp., 332 (333).

The only reference in the Commission's rules to the computation of the two-year statutory period is found in Rule 7(a) which by express terms makes that method of computing time inapplicable to filings under Rule 5(c), such as, complaints seeking reparation under section 22 of the 1916 Shipping Act. The Commission, however, has reserved the right in Rule 1(j) to waive all but one of its rules provided such waiver is not inconsistent with any statute and is warranted to prevent manifest injustice or undue hardship. Id. (333).

A tariff provision such as one requiring that a claim for adjustment of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carrier in writing before the shipment involved leaves the custody of the carrier, cannot be used to defeat a claim for reparation which was otherwise properly filed within the two-year statute of limitation period. Properly filed claims must be considered on the merits. Kraft Foods v. Moore-McCormack Lines, Inc., 407 (409).

An overcharge complaint relating to shipments delivered on November 12, 1973, which complaint was filed on November 12, 1975, was not filed within the two-year statutory period provided in section 22 of the Shipping Act, 1916, and was accordingly dismissed as untimely. The last day on which the action could have been brought was November 11, 1975; and as the Commission's offices were open for business on that day, no undue hardship permitting waiver of the timeliness requirement was found to exist. Commercial Solvents Corporation International, Inc. v. Moore-McCormack Lines, Inc., 424 (425).

An overcharge complaint relating to a shipment delivered on November 9, 1973, which complaint was filed on November 12, 1975, was not filed within the two-year statutory period provided by section 22 of the Shipping Act, 1916, and was accordingly dismissed as untimely. The last day on which the complaint could have been timely filed was November 8, 1975; however, as that day was a Saturday, and the Commission's offices were closed, the complainant would have been permitted to file its complaint through Monday, November 10. Rejection of the complaint at any time thereafter did not constitute an unfair hardship warranting the issuance of a waiver of the timeliness requirement. Id. (425).

Claims for reparation filed on December 29, 1975, which related to shipments shipped (according to their bills of lading) on December 21, 1973 and January 28, 1974 and on which freight charges were collected, respectively, on July 2, 1974 and April 2, 1974, were filed within the two-year statutory period provided in section 22 of the Shipping Act, 1916. A cause of action based upon a claim for reparation accrues at the time of shipment or at the time of payment of freight charges, whichever is later; in the instant case the payment of freight charges occurred later than the time of shipment, and the cause of action accrued at the time of collection. CSC International, Inc. v. Orient Overseas Container Line, Inc., 465 (470).

A cause of action on a claim for reparation for freight overcharges accrues at the time of shipment or payment of the freight whichever is later. Hobelmann International, Inc. v. Moore-McCormack Lines, Inc., 572 (574).

In accordance with the requirement of section 22 of the Shipping Act of 1916 that complaints must be filed within two years from the time the cause of action accrues in order for an award of reparation to be entered, a misclassification claim was timely filed where it was filed within two years of the payment of the freight, notwithstanding that a request for an adjustment based on the alleged error in description had not been presented to the carrier in writing before the shipment left the carrier's custody. Id. (574).

— Tariff designations; ambiguity

Where the bill of lading described the commodity as being in "bags" and this description was found in the carrier's tariff, carrier was not permitted to submit additional billing based on a higher tariff for the commodity "in other packaging." In *United States* v. *Gulf Refining Company*, 268 US 542 (1925), it was held that, when a commodity shipped is included in more than one tariff designation, that which is more specific will be held applicable; and, where two descriptions and tariffs are equally appropriate, the shipper is entitled to have applied the one specifying the lower rate. Union Carbide Inter-America, Inc. v. Venezuelan Line, 166 (169).

In a misclassification dispute where the shipper claimed that a cargo of rubber sheets and tapes should have been classified under the tariff item for rubber commodities titled "Synthetic (Not Articles or Materials manufactured therefrom)," there was no merit to the shipper's contention that the carrier's tariff was ambiguous inasmuch as all synthetic rubber is manufactured from petroleum products and other chemicals. Other than "Rubber, Synthetic" and "Rubber, Crude or Raw," all rubber categories in the tariff described specific products or groups of products; and the item in question was sufficiently clear as published to advise synthetic rubber experts and laymen alike that butyl bales or other unprocessed, unvulcanized forms of synthetic rubber were the only types of goods entitled to the "Rubber, Synthetic" rate. Crestline Supply Corporation v. The Concordia Line and Boise-Griffin Steamship Co., Inc., 207 (212).

Where the provisions of a conference tariff relating to the assessment of handling charges on certain containers tendered at the carriers' container yards was ambiguous as to whether such charges were applicable to tenders made at yards within terminal dock areas, the ambiguity would be resolved in favor of the shippers. Thus, reparation was awarded to shippers which had tendered containers to container yards within terminal dock areas. It appeared that the conference intended to assess a handling charge on some containers and not others, and, in view of the fact that some carriers maintained container yards within their terminal dock facilities while others did not, the fair construction of the tariff would be that a handling charge could properly be assessed on containers tendered at container yards not within the terminal dock area. It would be expected, all other things being equal, that the costs incurred by carriers maintaining container yards outside their terminal dock areas would be greater. Thus, it would not have been unreasonable for cargo tendered at a container yard within a terminal dock area not be assessed such a charge. Dow Chemical International, Inc. v. American President Lines, Ltd., 531 (540–541).

— Trade name rules

Trade name rules (items of carriers' tariffs which prohibit the use for commodity rating purposes of bills of lading describing goods by trade name) govern only the rating of cargo by the carrier at the time of shipment and cannot be invoked as a bar to a later showing in a proper proceeding before the Commission as to the exact nature of the

commodity shipped. The trade name rule only governs the rating of cargo based on description in the bill of lading. Accordingly, in a Commission proceeding seeking refund of an alleged overcharge, a shipper was entitled to show that the goods shipped, which were described in the bill of lading as "raw drugs," consisted of Cerelose power, a trade name for dextrose, and should therefore have been shipped at the rate for "dextrose" and not at the higher "harmless drugs" rate. Abbott Laboratories v. Venezuelan Line, 426 (428).

Tariff rule requiring the application of a cargo N.O.S. rate where a bill of lading describes articles by trade names can only be invoked when an article is described on the bill of lading by trade name. In any event, claims cannot be defeated by simply reference to the rule but must be determined on the basis of the evidence as to the true nature of the cargo. If the evidence shows that a more specific tariff item fits the commodity shipped, claimant is entitled to be rated under that item. Carborundum Co. v. Royal Netherlands Steamship Co. (Antilles) N.V., 431 (434–435).

SECTION 19 REGULATIONS

Regulations to adjust or meet conditions unfavorable to shipping in U.S. foreign trade are amended to make it clear that Commission action under the regulations is discretionary; to indicate that the Commission was not concerned with mere differences in treatment of the vessels in U.S. foreign trade but is concerned with the effect those differences in treatments have upon U.S. foreign trade; to make it clear that the regulations apply to the acts of foreign governments or foreign owners, operators, agents, or masters; to indicate that the Commission is not limiting the application of the section dealing with who may file petitions for section 19 relief by specifically naming some of the persons who may file; to give foreign countries notice that the Commission will notify the Secretary of State when conditions unfavorable to shipping in the U.S. foreign trade apparently exist and that it may request that he seek resolution of the matter through diplomatic channels. Section 19 Regulations, 13 (14).

Regulation requiring the Commission to find conditions unfavorable to shipping in the U.S. foreign trade, when there was a failure to produce any information ordered by the Commission to be produced, is amended to make such action by the Commission discretionary. Id. (15).

Regulations promulgated to meet conditions unfavorable to shipping in U.S. foreign trade are not to be construed in any way whatsoever as a substitute vehicle by which agreements approved under section 15 of the 1916 Act might be contested. Likewise the new rules are not intended in any way to replace, modify, or limit the traditional criteria considered in connection with applications under section 15. Id. (15).

SECURITY FOR THE PROTECTION OF THE PUBLIC

Since respondents were not the owners, operators or charterers of the vessels involved in the case, they did not violate section 2 of Public Law 89–777 which provides that each owner or charterer of an American or foreign vessel having berth accommodations for fifty or more passengers, and embarking passengers at U.S. ports, shall establish, under Commission regulations, his financial responsibility to meet any liability he may incur for death or injury to passengers or other persons on voyages to or from U.S. ports. Windjammer Cruises, Inc. and Windjammer Cruises, Ltd., 112 (122).

In boarding passengers for a cruise on a vessel at Mayaguez, P.R., respondent violated both section 3 of Public Law 89–777 and the implementing regulations, in that it did, in the United States, arrange, offer and sell passage to 29 passengers on a vessel

having berth or stateroom accommodations for 50 or more passengers, embarking passengers at a U.S. port, without there first having been filed with the Commission such information as the Commission deemed necessary to establish respondent's financial responsibility or other security for indemnification of passengers for nonperformance of transportation and without there being in force and effect a Certificate (Performance) issued to or covering respondent. The law makes no exception for single occurrences. Id. (122–123).

The language of P.L. 89–777 is clear and unambiguous, and leaves no doubt that its provisions apply to all vessels which embark passengers at U.S. ports and which have stateroom accommodations for 50 or more persons even if the operations of the vessel otherwise fall within the jurisdiction of the ICC. The legislative history shows the intent of Congress to protect passengers from default by any passenger vessel and to avoid evasions of law. American Cruise Lines, Inc., 420 (422).

SURCHARGES

The Commission promulgates a regulation to provide nonexclusive procedure by which a conference of carriers operating in U.S. foreign commerce and under an approved dual rate (system) may justify and impose uniformly applied currency surcharges on all rates within the scope of its dual rate contract on less than 90-day notice when necessary because of depreciation of the conference's tariff currency. Currency Adjustment Surcharges, 4.

The computation and justification for currency adjustment surcharges by a conference is founded on a calculation of "major operating currencies" and the percentage of expenses incurred by a conference and its members in those currencies. The percentage of expenses information is to be maintained up to date by the conferences, and those figures submitted to the Commission on a quarterly basis. Id. (5).

Currency surcharges imposed must be removed or reduced when the tariff currency appreciates in relating to other major operating currencies. Id. (6).

A conference may select its own base date to compare relative currency values in connection with imposition of a currency adjustment surcharge. The date must be specified in the conference dual rate contract. No base date may be chosen which antedates the day on which the amended contract is submitted to the Commission for approval. Id. (6).

Currency adjustment surcharges imposed by a conference may be made applicable to the conference trade as a whole or to particular trades or segments of trades covered by the terms of the dual rate contract and the tariff of the conference involved. Id. (6).

Any currency adjustment surcharge imposed by a conference must be kept completely separate from the general rate structure of the conference. Id. (7).

A currency adjustment surcharge imposed by a conference shall take place in increments of two percent or more. Id. (7).

TARIFF CIRCULAR NO. 3: See Rates

TARIFFS

Where an ambiguity exists in a tariff, then the tariff must be construed in such a manner so as to resolve the ambiguity in favor of the shipper. Moreover, the Commission has long recognized that tariff terms should be interpreted reasonably. United States Lines, Inc., 100 (102).

If an ICC regulated carrier and a section 1 water carrier offer a through international

service, they must file a tariff listing their through rate and their respective rate "divisions" or "portions." Austasia Container Express, 512 (519).

Inasmuch as respondent is a common carrier by water in foreign commerce within the meaning of section 1 of the 1916 Shipping Act, it must file a tariff which fully complies with Part 536 of the Commission's Rules. Id. (521).

Complainant shipper in a reparation proceeding alleging that it should not have been assessed handling charges on certain containers pursuant to conference tariff, which had admitted that such charge was proper pursuant to the tariff on containers tendered to carriers at their container yards, was not estopped from asserting that tender at container yards within the carrier's terminal dock area was tender at the docks within the meaning of the tariff. Dow Chemical International, Inc. v. American President Lines, Ltd., 531 (538).

Proceeding to determine the legality under sections 16, 17 and 18(b) of the 1916 Shipping Act as amended "consolidation allowance" provisions contained in tariffs is discontinued. The amended rules had been replaced under court order by the original rules to the satisfaction of all affected interests. The order of investigation referred only to the amended rules and did not cover a broad study of consolidation rules in general. The Commission takes no position at this time as to merits of issues alleged by Hearing Counsel to have survived the cancellation of the amended rules. Consolidation Allowance Rules, 735 (736–738).

Tariffs of 35 nonvessel operating common carriers are cancelled in view of the fact that they do not actively solicit or provide common carrier services. It is misleading to the public, potentially unfair to competing carriers, and an administrative burden on the staff, for "paper" tariffs to be kept on file for possible use if it should suit the narrow purposes of the persons issuing them to quickly enter the trade, but otherwise describing a nonexistent service. Such a situation contravenes the implicit requirements of sections 18(b)(1) through (3) of the Shipping Act, which necessitate the prompt submission of accurate information concerning the services offered by a common carrier, including the suspension of all or any part of the operations described by its published tariff. Publication of Inactive Tariffs by Independent Carriers in the Foreign Commerce of the United States, 774 (775).

A transshipment tariff was cancelled on the date notice of cancellation was received by the Commission, not on the prior date when the Commission received notice of the cancellation of the underlying transshipment agreement. The Commission's rules do not provide for the automatic cancellation of transshipment tariffs on receipt of notice that an underlying transshipment agreement has been cancelled. As long as the tariff did not include an amendment or provision which purported to cancel it, the tariff contained the only legal rates the carrier could have charged for the transshipment service covered by that tariff, even though the actual provision of such service would have violated section 15 of the Shipping Act. States Steamship Co., Far East/USA Household Goods Tariff No. 2, FMC–9, 793 (796–797).

A tariff has one major purpose—to prevent rebates and other types of unjust discrimination by publicly stating the rates to be charged all eligible shippers. Tariff filings are neither adjudicatory matters nor finally determinative of individual rights or privileges. Once accepted by the Commission, a tariff must be adhered to by the publishing carrier and shipper alike. To retroactively declare a duly accepted tariff void for noncompliance with the Commission rule which requires that a permanent tariff modification (here, cancellation of a tariff) be filed within 15 days of receipt of a temporary amendment would contravene the regulatory scheme established by most federal common carrier statutes, including the Shipping Act. Id. (797).

A tariff notice was effective on receipt by the Commission where it did not increase rates, but eliminated the services altogether. Id. (797).

The Commission's Rules do not indicate how or when a tariff submission is "accepted for filing," but provide for the rejection of tariff matter in certain instances. It is generally assumed that a tariff which is not rejected by the close of business on its stated effective date has been accepted for filing. Where there is an after hours telex filing, a "rule of reason" applies. If the tariff submission is in proper form it is accepted retroactively. If significant errors exist, then the tariff is rejected as expeditiously as possible on the theory that it was never accepted and not on the theory that it was void *ab initio*. Id. (797).

TERMINAL LEASES

Terminal lease agreement between the City of Anchorage and Sea-Land Service, Inc., providing for a shift of Sea-Land's preferential berth from Terminal 1 to Terminal 2 on February 1, 1976 will not be temporarily approved. Severe icing occurs at Anchorage, and there is the real possibility that Totem's vessel could be damaged because of the mooring and weather conditions. Totem will not berth at Terminals 2 and 3 during the severe icing conditions because of the risk to the vessel and her crew. If Totem cannot use POL-Terminal 1, even on a first-come-first-served basis, it may be forced to leave the trade, at least temporarily. Totem's refusal to use Terminals 2 and 3 is reasonable. Continuation of Totem's service to Anchorage is in the public interest and should be maintained if possible. Continued use of Terminal 1 by Sea-Land in a preferential basis is contrary to the public interest in violation of section 15 of the 1916 Act, in that there is a real possibility that it will serve to effectively preclude Totem from offering a competitive service during severe icing conditions. Therefore, the presently approved agreement between the City and Sea-Land which gives Sea-Land preferential berthing rights at Terminal 1 will be disapproved effective February 5, 1976, unless the parties, prior to that date, amend the agreement to provide that effective February 5, 1976, such preferential berthing rights shall not apply during the months of February through April 1976. Agreement Nos. T–1685, as Amended and T–1685–6: Between the City of Anchorage and Sea-Land Service, Inc., 69 (79–80).

Agreements providing for preferential berthing rights at Anchorage, Alaska, are ambiguous in that no agreement between the parties exist as to what charges can be paid once the preferential calls provided in the agreements are exceeded. As long as the ambiguity exists the agreements are contrary to the public interest and cannot be approved. Therefore, before approval can be accorded to the agreements, the parties must modify them to clarify the ambiguity. Agreement No. T–1685, as Amended, and T–1685–6: Between the City of Anchorage and Sea-Land Service, Inc., 440 (445).

Agreements giving carriers preferential berthing rights at Anchorage, Alaska, are contrary to the public interest and not approvable unless modified to ensure that another carrier has sufficient terminal space available for cement discharging operations. Id. (446).

The critical determination with respect to the approvability of preferential berthing agreements at Anchorage, Alaska, is whether they are unjustly discriminatory or unfair as between carriers, exporters or importers, or operate to the detriment of the commerce of the United States, or are contrary to the public interest, or are otherwise in violation of the Shipping Act. While admittedly, both agreements will result in certain delays and disruption of operations of other carriers, overall, these delays and disruptions will be minimal and certainly not of such magnitude as to preclude approval. Commission

consideration of both agreements must take into account the public interest factor, as it exists at the time of approval; however, the fact that the only carrier vigorously opposing approval will have significantly less dependency upon the Anchorage docking facilities once the oil pipeline is completed cannot be ignored. The record will not support a finding that either agreement, as modified, is contrary to the public interest. Id. (450–451).

Agreement between Anchorage and a carrier, providing for construction by and use by the carrier of trestles, was part and parcel of an agreement between the parties giving the carrier preferential berthing rights at Anchorage, and the construction and use of the trestles prior to approval of the berthing agreement was a clear violation of section 15 of the Shipping Act. The construction and preferential use of the trestles was described with sufficient particularity to include it within the berthing agreement. That agreement was replete with references to the trestles and whole sections of the trestle construction agreement were repeated verbatim therein. Id. (454).

Violation of section 15 of the Shipping Act by construction and use of trestles at Anchorage, Alaska, prior to Commission approval, does not preclude approval of the underlying preferential berthing agreement between Anchorage and carrier which constructed and used the trestles, if the agreement is otherwise approvable under the standards of section 15. Id. (454).

Carrier party to a preferential berthing agreement will be held to the terms of its agreement and required to berth its vessels on a preferential basis "approximately one time per week." "Approximately" means that the carrier will be limited to one preferential call per week unless it is unable, by reason of weather conditions, an emergency to its scheduled vessel, or other conditions beyond its control to make a preferential call during a given week. In such circumstances, the carrier will be permitted to double its preferential calls in a subsequent week. As an alternative to doubling its calls, the carrier may employ a replacement vessel to make a scheduled preferential call without providing the required 15 days' notice. Further, the carrier must provide the port with prompt notice of its inability to make a preferential call as scheduled, and its intent to utilize one of the two alternatives. Id. (455–456).

Leases to certain back-up areas at Anchorage, Alaska, are not subject to section 15 of the Shipping Act. This determination is based not only on a review of the leases but on a consideration of the interrelationship between preferential berthing leases and the back-up area leases. There is no basis in the record on which it can be found that the back-up leases were part of the total understanding between the parties. Id. (457–458).

To the extent that certain modifications of preferential berthing agreements reflect the understanding of the parties with regard to the future implementation of the agreements, they should be filed for approval pursuant to section 15 of the Shipping Act before they are implemented. Id. (459).

The Commission has previously disapproved terminal practices under Shipping Act, section 17, second paragraph, which did not recover fully distributed costs. As a general rule, all terminal users are expected to pay their own way. Nonetheless, "noncompensatory" is not synonymous with "unreasonable." Justifications can be and have been accepted for terminal tariffs or leases with noncompensatory features. In this case, the terminal lease agreements would be at least incrementally profitable, and, if implemented as month-to-month tenancies, would not bind either party to a particular level of rents for more than 30 days. Agreement No. T–2880, as Amended, 680 (684).

Although the record offers no reason to disapprove the minimax concept or the particular charges proposed in lease agreements between the Port Authority and carriers or terminal operators, the Commission cannot ignore the fact that the only basis for the

lessees' use of the involved piers to date which was not violative of section 15 was under the Port Authority's public tariff and the parties have not adhered to that tariff. The tariff contains no provisions for monthly "on account" billing (pending approval of the agreements) with subsequent adjustments nor does it permit extensions of credit in the unusual amounts and periods which have been extended to several proposed lessees. Moreover, in the case of two piers, one lessee was allowed to continue its exclusive occupancy for five months after the prior lease expired before the Port even declared those facilities to be public piers. This course of conduct represents at least a cooperative working arrangement which was not reduced to writing, filed and approved by the Commission as required by section 15 and constitutes a violation of that statute. It also represents a violation of the Commission's rules by the Port Authority. The section 15 violation has not proximately injured an objecting terminal operator and it is not entitled to reparations. Id. (684–685).

Terminal lease agreements between the Port Authority of New York and New Jersey and carriers or terminal operators are section 15 agreements within the jurisdiction of the Commission and all the parties to the agreements are carriers or other persons subject to the 1916 Shipping Act. Id. (698).

TERMINAL OPERATORS: See also Terminal Leases

Action of carriers in stopping payment of "heading" charges on shipments of cotton to Houston, but continuing to make such payments at Galveston and Corpus Christi did not violate section 16 and 17 of the Shipping Act, 1916. There was no basis for a determination that carriers are selectively absorbing costs at Galveston and Corpus Christi which should be paid by their shippers or are otherwise unfairly discriminating against the Port of Houston. The record did not support the argument that the "heading" charges paid by the carriers are not true operational costs customarily associated with vessel loading and included in ocean freight rates without itemization. Nor did the record support the conclusion that the delivery of export cotton bales to the carriers at Galveston and Corpus Christi was completed only after the challenged "heading" services are performed. No Shipping Act authority holds that completion of delivery is the sole criterion for allocating cargo handling expenses between shipper and carrier, and a flat policy which makes the validity of a given division of such expenses depend on the moment a carrier chooses to issue a cargo receipt would be arbitrary in the extreme. Port of Houston Authority v. Lykes Bros. Steamship Co., Inc., 192 (200).

The Port of Houston failed to establish why its 1963 decision authorizing a uniform cotton "unloading" fee (paid by the shipper) which includes positioning bales in the transit shed should necessitate a change in Galveston's and Corpus Christi's pre-existing cotton handling practices ("heading" charges paid by carriers). The burden of proof in a section 22 complaint proceeding is always on the complainant. Id. (200).

The Shipping Act does not require all carriers or all ports to offer identical services or engage in the same practices. Competition and innovation are encouraged. Local differences are permitted up to the point they unfairly injure shippers, ports or other persons protected by the Act. Id. (200–201).

There was no basis for finding that carriers violated section 18(b)(3) of the Shipping Act, 1916 by failing to file tariffs which state when the basic ocean freight rate will include "heading" charges on cotton shipments. The Port of Houston did not establish whether shippers or carriers primarily benefit from any particular aspect of cotton handling at Galveston or Corpus Christi, where carriers pay such "heading" charges. No one other than the carriers was identified as having a duty to pay for "heading" and

there was no indication that this practice materially affects the aggregate cost of shipping cotton at the various ports. The gravamen of the dispute lies not with the carriers' tariffs, but with those of the Port Authorities whose tariffs should be amended to reflect the actual unloading and heading practices followed by each port. Id. (201).

Practices of the Port of Houston Authority, in connection with the rental of heavy crane equipment, under which Houston's cranes have first priority on jobs, even to the extent of displacing private crane owners' equipment already working, violate sections 16 First and 17 of the 1916 Shipping Act, not only as applied against private crane operators, but also with regard to stevedores hiring private cranes. Houston has unjustly preferred itself to private crane owners and subjected stevedores hiring private crane owners to "bumping" and other unreasonable practices while exempting stevedores who own their own cranes from such practices. Perry's Crane Service, Inc. v. Port of Houston Authority of Harris County, Texas, 548 (549).

The Port of Houston's practice of giving itself first priority on cranes must be limited. Prior to the start of any job a stevedore should determine the availability of Houston's cranes and if there is one equally suitable for the job at hand then Houston should be given a preference as to furnishing a crane for that job. The limited preference is justified because of Houston's heavy investment in cranes and extensive labor-related expenses and guarantees; declining share of available crane work; the flexibility of private cranes in moving from one location to another—an option not open to Houston; the fact that private crane owners are using facilities constructed and paid for by Houston to conduct their private business; and the absence of any evidence that Houston is attempting to monopolize the crane rental business on its facilities. Limiting of the preference results in a practice which, while still preferential, is no longer undue or unreasonable—the key determination. The first call privilege, as modified, will require stevedores to select a Houston crane only if that crane is suitable for the job in the judgment of the stevedore in terms of size and expense as any available crane. Id. (551–552).

Practice of the Port of Houston, in connection with the rental of heavy crane equipment, of preferring its own cranes to the extent of "bumping" other crane equipment is unlawful and cannot be justified even if modified to allow Houston "bumping" privileges if it can furnish a more suitable crane for the job than that provided by the private crane owner. Assuming the unavailability of a Houston crane and the election by a stevedore to use a private crane for a particular job, that private crane owner should be permitted to perform the job to completion without "bumping" by a Houston crane. Id. (552).

The burden of proof in a proceeding involving the approvability of exclusive terminal lease agreements was upon the objecting terminal and Hearing Counsel, and the evidence adduced failed to establish that the Port Authority engaged in or is proposing to engage in anticompetitive, unduly preferential, or unreasonable practices. The Port Authority knew that the mini-max rentals were unlikely to be fully compensatory at cargo levels projected for 1973 and 1974, but this fact alone does not support a finding that the Port Authority was engaging in a predatory price cutting scheme aimed at other breakbulk terminal operations within the Port. When breakbulk tonnages dropped unexpectedly between 1969 and 1974 the Port Authority, as the owner of the modern, relatively expensive facilities, could offer them at terms the breakbulk market would accept or close them down completely. The Port Authority's choice of the former course of action could not be faulted under the circumstances. If only minimum rents are paid, the Port Authority would still net more income than it would closing the facilities. Thus, the users of other Port facilities would not be required to unfairly "subsidize" the operations. Agreement No. T–2880, as Amended, 680 (683).

TRUCK DETENTION

With respect to truck detention payments by terminal operators at the Port of New York, the conditions under which a terminal operator would not be assessed a penalty under the rule are expanded to include Acts of God, fires, and serious accidents. However, "congestion" and "work slowdown" will not be included. Truck Detention at the Port of New York, 25 (26–27).

The purpose of the rule which provides that terminal operators at the Port of New York shall not be liable for the time consumed by receipt or delivery of cargo by marks other than by bill of lading, provided at the request of the shipper consignee or motor carrier, is to provide that the shipper-importer will be responsible for delays where the terminal operator is required to sort or separate shipments by marks. Additionally, the rule contemplates that as to a single motor carrier loading/unloading multiple LTL shipments, time, for purposes of the rule, shall not be computed separately for the loading/unloading of each shipment, but rather shall accrue during the entire period the vehicle is being loading/unloaded. This should not be confused with the rule dealing with several vehicles picking up/delivering multiple shipments on a single delivery order/dock receipt, where time shall be computed separately for each vehicle. Id. (27).

The rule establishing procedures to be followed by terminal operators at the Port of New York who elect to deliver breakbulk cargo to motor carriers prior to full discharge of the vessel is not concerned with situations involving the stripping of containerized cargo. Moreover, the rule does not require but merely permits the terminal operator to effect delivery before the vessel is discharged. Because one particular rule makes it the particular responsibility of the consignee or his agent (motor carrier) to determine when a cargo is available (at non-appointment piers) and another rule will not allow appoints unless the cargo is properly available, the terminal operator has to advise the motor carrier only when the cargo is so available. For example, until breakbulk shipments have been stripped from the container, there is nothing which obligates the terminal operator to make delivery as soon as the vessel discharges its unstripped containers. Id. (28).

Rule relating to truck detention at the Port of New York is amended to require that the terminal operator employee authorizing delivery of cargo prior to the vessel being fully discharged be identified. Id. (28).

Rule allowing the terminal operator at the Port of New York the option of selecting the system under which it will operate will not be amended to delete the non-appointment and combination procedures and keeping only the appointment system wherein truck detention time begins when the motor carrier arrives at the gate. However, the rule is modified to require that any change in the procedures at a given pier should only be made on 30 days notice and on filing of an appropriate tariff amendment. Id. (28–29).

Truck detention rule at the Port of New York which prohibits prelodging of delivery orders will not be altered. When a trucker does not have in his possession a full and complete delivery order on arrival at the pier, delay in fact occurs. Movement of cargo from the piers is appreciably slowed down while terminal personnel are straightening out the problems created by an incomplete or lost pre-lodged order. Id. (29).

Prelodging of dock receipts with marine terminals at the Port of New York does not create any significant truck detention at the Port. Delay at the Port is due to prelodging of delivery orders. In some situations prelodging of the dock receipt is the only practical solution if there is to be a prompt receipt of the export cargo in order that the motor carrier can unload as soon as it arrives at the piers. Prohibiting of dock receipts would disrupt pre-reserved shipping space since, in many instances, the ocean carrier

transporting the goods will insist on knowing, in advance, the size and amount of the shipment it has "booked"; and it would be unwise because it would lead to the misuse of blank dock receipts which would have to be left at inland points if no prelodging is permitted. Id. (30–31).

The Commission will allow the continuance of the practice of prelodging dock receipts with terminal operators at the Port of New York without any service fee. A $15 assessment fee would work only as a penalty by unreasonably burdening the shipper who is trying to export his product as quickly and cheaply as possible, and could drive the small inland shipper out of business. Id. (31).

The practice at the Port of New York of presenting open delivery order/dock receipt documents on less than truckload shipments will not compound the problem of cargo security at breakbulk terminals. By permitting a terminal operator to establish his own safeguards for the handling of LTL shipments, security would be improved. Id. (32).

The Commission will not require that dock receipts lodged with terminal operators at the Port of New York be in exact conformity with the U.S. Standard Master or that the terminal operator be allowed complete discretion to determine the form or content of the dock receipt. A terminal operator will have discretion to vary the format of a document while he will be required to embody information therein to be applicable portwide. Id. (32).

All that is needed for the proper delivery of cargo at the Port of New York is a document containing information sufficient to properly identify the shipment to all parties concerned and to authorize its delivery. Id. (33).

Terminal operators at the Port of New York are allowed to refuse to complete or correct the documents necessary to effect the pickup or delivery of cargo. Id. (33–34).

Rule requiring motor carriers to arrive at a marine terminal at the Port of New York 15 minutes prior to his scheduled appointment is amended to provide that a motor carrier need only arrive in time to proceed directly for pickup or delivery of cargo. Id. (35).

Rule requiring that service periods be established for each business day at a terminal at the Port of New York operating on a nonappointment system will not be revised to require the terminal operator to publish in its tariff the daily capacity of each terminal facility and the number of vehicles to be scheduled in each service period. To adopt the revision would stifle any effect the rule would have in alleviating congestion at the Port. Id. (36).

Rule relating to the procedure for insurance of a time-stamped gate pass which will institute free time for the motor carrier in delivering or picking up cargo at marine terminals at the Port of New York will not be revised to require motor carriers, upon receiving their time-stamped gate pass to proceed to the delivery/receiving clerk's office for the purpose of being time recorded in the terminal operator's security log. To permit a terminal operator to record a different time in its own records for the commencement of free time is contrary to the purpose of the validation and entry procedures under which the validation time on the gate pass constitutes the official time for the commencement of free time. Id. (36).

Truck detention rule at the Port of New York is revised to eliminate the requirement that customs time stamp documents (customs will not issue time stamps) and to simplify the procedure by allowing the motor carrier, upon validation of his gate pass on arrival at the pier, to proceed directly to customs for the processing of his papers. Thereafter, the motor carrier's papers are presented to the delivery clerk of the terminal operator for the stamping of the gate pass, at which point, time for purposes of detention commences. Id. (37).

Rule permitting the terminal operator at the Port of New York to turn away motor carriers when the capacity of a terminal facility has been reached, but not before issuing preference slips for service on the next business day, will not be deleted. It is doubtful that vehicles will be turned away capriciously if service of those vehicles is possible. Moreover, a rule which would require a facility to exceed its capacity would not be workable. Id. (37–38).

Rule assessing a $15 penalty against a terminal operator at the Port of New York for refusing service to a motor carrier possessing complete documentation is revised to increase the penalty to $30. Id. (38).

Rule relating to assessment of a penalty of $15 on a motor carrier for failure to meet a scheduled appointment at a marine terminal facility at the Port of New York is revised to add a provision increasing the penalty to $30 if the motor carrier has been advised that special equipment will be required and he fails to meet his appointment. Id. (39).

Rule providing that if a motor carrier seeks and gets a scheduled appointment at a marine terminal facility at the Port of New York prior to issuance of a freight release of the subject cargo, the motor carrier will be penalized $15, is revised to assess the penalty on the terminal operator and to increase the amount to $30. Id. (39).

Rule providing for the assessment of a $15 penalty against the terminal operator at the Port of New York for wrongfully advising the motor carrier that cargo is ready and available is revised to provide for a penalty of $30. Id. (40).

Rule providing for the assessment of a $65 penalty against the terminal operator at the Port of New York who refuses service to a motor carrier holding an appointment, when the refusal is due to a lack of manpower, is revised to reduce the penalty to $30. A part of the obligation of the terminal operator to complete loading/unloading the motor carrier is the responsibility to foresee labor problems which would tend to delay operations. In the case of refusal to service a nonappointment vehicle as a result of labor's refusal to work overtime, the terminal operator is relieved of any liability. Id. (41).

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